

AN OXFORD HIGH SCHOOL PHYSICS

A. D. JOSHI, B.Sc., L.T.C.

UNITED PROVINCES EDUCATIONAL SERVICE
LECTURER, TRAINING COLLEGE, ALLAHABAD

HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS
BOMBAY CALCUTTA MADRAS

Published by
P C SARKAR, B L
of S C SARKAR & SONS, LTD.,
1-1-17, College Square, Calcutta

Printer P C RAY
SHI COM RANGA PRESS,
5, Chittaram Das Lane, Calcutta

TO

MR. JUSTICE CHARU CHANDRA BISWAS

WITH GRATITUDE FOR MUCH KINDNESS

HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

APPEAL FROM ORIGINAL DECREE No. 1 OF 1937

From a Decision of
MR PANNALAL BASU,

ADDITIONAL DISTRICT JUDGE, FIRST COURT, DACCA

In

TITLE SUIT No. 38 of 1935

(Originally numbered as Title Suit No. 70 of 1930 of the First Court, and then
as Title Suit No. 5 of 1933 of the Fifth Court, of the Subordinate Judge, Dacca)

DATES

Suit Instituted	24th April, 1930
Hearing commenced	27th November, 1933
Hearing concluded	20th May, 1936
Judgment of Trial Court	24th August, 1936

Appeal presented to High Court	5th October, 1936
Hearing commenced	14th November, 1938
Hearing concluded	14th August, 1939
Judgment of High Court	25th November, 1940

Judges of the Special Bench :

THE HON'BLE JUSTICE SIR LEONARD WILFRED JAMES
COSTELLO, Kt, M A, LL B, Barrister-at-Law
THE HON'BLE MR. JUSTICE CHARU CHANDRA BISWAS,
CIE, MA, BL
THE HON'BLE MR. JUSTICE RONALD FRANCIS LODGE,
BA, ICS.

Counsel for the Appellants :

Mr A N. Chaudhuri,
Mr Phani Bhusan Chakravarti,
Mr Pankaj Ghose,
Mr Sanjib Chaudhuri and
Mr P. B Mukherjee.

Counsel for the Respondents :

Mr B C. Chatterjee,
Mr Bankim Mukherjee,
Mr Atul Gupta,
Mr J C. Gupta,
Mr Nagendranath Bose,
Mr Arabinda Guha,
Mr Nirmal Chakravarti and
Mr Muktipada Chatterjee.

PREFACE

1

Few cases have been brought before the courts which have aroused such widespread public interest as what is popularly known as the Bhowal Sannyasi's case, and no apology is, therefore, needed for this attempt to make available for the first time the full text of the judgments of the Special Bench of the Calcutta High Court which disposed of the appeal in favour of the *sannyasi* claimant.

The Special Bench consisted of three learned judges—the Hon'ble Mr Justice Costello, the Hon'ble Mr Justice Biswas and the Hon'ble Mr. Justice Lodge. The senior judge, however, went away on leave after the hearing was over and after having prepared only a part of his judgment. The judgment was finally completed by him in England, and he sent it out from there to be pronounced in Court by his colleagues. A new Rule was in the meantime added to the Civil Procedure Code expressly authorising such procedure. The fact, however, that the final decision of the learned judge was not known even to his colleagues till the moment his judgment was actually read out served to add an element of unusual interest to a case which was not already lacking in extraordinary features. The final issue in the appeal was in fact left hanging in the balance for quite a long time even after all the three judgments had been delivered.

Counsel for the defendants is reported to have announced the intention of his clients to take the matter in appeal to the Privy Council. It would be some time, therefore, before the curtain is finally rung down upon the legal drama, the first scenes of which opened at Dacca more than eleven years ago.

Should the decision of the Special Bench be upheld in appeal, the Bhowal case would live in legal history as probably the first instance in which a supposed impostor would have successfully established his claim before a judicial tribunal.

The facts of the case are already so well-known, and have been set out with such fulness in the judgments which are now reported, that it is not necessary to attempt to re-capitulate them again. Suffice it to say that the story is one of intense human interest, which cannot but firmly grip the reader's mind, as he sees it unfolded before him in all its varied and bewildering ramifications.

It remains now to express the Editor's acknowledgments for all the help and kindness he has received in the preparation of this volume.

In the first place, he is deeply indebted to the learned judges of the Special Bench for having made true copies of the judgments available for publication. His special gratitude is due to the

Hon'ble Mr Justice C C Biswas, C I E , for his kindness in having read the final proofs This itself should be a guarantee of complete accuracy

For convenience of reference, appropriate paragraph headings have been inserted, but these do not form part of the judgments as pronounced

The Editor desires next to express his gratitude to Mr Suresh Chandra Majumdar, Managing Director of the Ananda Bazar Patrika, Limited, for the facilities he rendered in getting the book through the press Considerable help has also been derived in this connection from Mr Susil Kumar Biswas, Mr Parimal Mukherjee and Mr Nirmal Chakravarti, Advocates Special thanks are due to the last-named gentleman for having undertaken the preparation of the Index, which, though not exhaustive, will, it is hoped, be still found quite helpful

Mention should also be made of Mr Ajit Kumar Chatterjee, for general secretarial assistance rendered by him

In conclusion, the Editor should like to say that he will feel more than amply rewarded, if the public appreciate the labours of those who have so ungrudgingly given their co-operation in bringing out this volume

SACHINDRA CHANDRA DAS GUPTA

The 1st July, 1941

CONTENTS

BISWAS, J'S JUDGMENT (pp 3-433 and pp 869-872)

Introduction

Prefatory Remarks (p 3)—Judgment Begins (p 3)—Plaintiff's Case (pp 3-4)—Parties to the Suit (p 5)—Defence Case (p 5)—Questions At Issue (pp 5-6)—Identity—the Main Question (pp 6-7)

Darjeeling Chapter, Respective Cases (pp, 7-8)

Morning Cremation Admitted (pp 8-9)—Improbability of Substituted Dead Body (p 9)—How far it affects Plaintiff's Case (pp 9-10)—Death at Dusk (p 10)—Defendants' Criticism of Trial Court's Judgment (p 11)—Identity, a Fact Capable of Legal Proof (pp 11-12)—Judge's Order of Treatment justified (pp 12-13)

Some Broad Facts

Some Broad Facts—Defence Story, Plaintiff, a "Medicine Man" (pp 13-14)—Not Suspected as Second Kumar (p 14)—Jyotirmoyee Devi; *de facto* Plaintiff (pp 14-15)—Question of Motive (pp 15-16)—"Atma Parichaya" (pp 16-17)—Needham's Report of 5th May, 1921 (p 17)—Further Report by Assistant Manager (p 17)—Dr Ashutosh Das Gupta's Letter of May 5, 1921 (pp 17-18)—Public Recognition of Plaintiff as Kumar (p 18)—Attitude of Court of Wards (pp 18-19)—Propaganda (pp 19-20)—Conduct of Satyendranath Banerjee (pp 20-22)—Visit to Darjeeling (p 22)—Recording of Statements (pp 22-23)

Genesis of Darjeeling Enquiry (pp 23-24)—Commencement of Official Enquiry (pp 24-25)—Suppression of Official Records (pp 25-26)—Lindsay "convinced" from the beginning of Kumar's Death (pp 26-28)—Sister's Petition to Lindsay for Enquiry as to Identity (pp 28-29)—Enquiry Refused (p 29)—Misleading Suggestions to Plaintiff (pp 30-31)—Lindsay's Warning Notices (p 31)—Punjab Enquiry (p 31)

Lindsay's Interview with Plaintiff on May 29, 1921 (pp 31-36)—Record not Reliable (pp 36-37)—Issue of Impostor Notice (pp 37-38)

"The Story of the Sadhu" (pp 38-39)—Possible Sources of the Story (pp 39-41)—Its Real Object (p 41)—R C Datta's Questionnaire (pp 41-42)

Further Recording of Statements—Dr Pran Krishna Acharyya (p 42)—Calvert (p 43)—Haran Chandra Chakladar (pp 43-45)

Visit of Bawa Dharam Das Naga to Dacca (pp 45-48)—Introduction of a New Guru—Aghori Baba (pp 48-49)

Further Action by Lindsay (pp 49-50)—Documents called for by Bara Ranu (p 50)—Telegram of Death (pp 50-53)

Diary of Satyendranath Banerjee

Diary of Satyendranath Banerjee (pp 53-54)—Satyendra's Explanation (pp 54-57)—Was he lying to himself? (pp 57-58)—Diary Entries—how far evidence for or against the Plaintiff (pp 58-59)—Missing Pages (pp 59-60)—Presumptions arising therefrom (p 60)—Story of Kushaputtalika (pp 60-62)—Procuring of Insurance Affidavits (pp 62-63)—Alleged Promise of Donation at Darjeeling by Satyendra (pp 63-66)—No Motive for Plaintiff's Suppression of Missing Pages (pp 66-67)

Darjeeling Chapter (pp 67-68)—Respective Cases as made in the Pleadings (pp 68-69)—Points of Divergence (pp 69-70)—Charge of Conspiracy (pp 70-71)—Findings on Darjeeling Chapter—How far based on Identity (p 71)—Appellants' General Criticism considered (pp 72-76)—Scheme of the Judgment (pp 76-78)

Telegrams and Prescriptions

Telegrams (pp 78-80)—Prescriptions (pp 80-84)—Value of Prescriptions as Evidence (pp 84-85)—Arsenic Prescription (pp 85-88)—Prescription No 1 (pp 88-91)—Prescription No 2 (pp 91-94)—Prescription No 3 (pp 94-97)—Prescription No 4 (pp 97-98)—Prescription No 5 (pp 98-100)—Prescription No 6 (pp 100-101)—Story of Poisoning, how far a material part of Plaintiff's Case (pp 102-107)—Cyst on the Tongue (pp 107-108)

Darjeeling Chapter

1. Nature and course of illness

Nature and Course of Illness (pp 108-110)—Symptoms of Bilary Colic (pp 110-114)—Symptoms of Arsenical Poisoning (pp 114-116)—Second Kumar's Symptoms (p. 116).

Oral Evidence (pp 116-117)—Documents—Calvert's Letter to Lindsay (pp 117-118)—Mukunda's Telegram to Bara Kumar (pp 118-120)—Dr Das Gupta's Evidence (pp 120-122)—Darjeeling Telegrams (pp 122-123)—Symptoms (pp 123-124)—No Mention of Bilary Colic (p 124)—Necessity for Hypodermic Injection (pp 124-125)—Detailed Examination of Telegrams (pp 125-126)—Kumar's Condition on 7th Night (pp 126-128)—"A Suggestion of Despair" (pp 128-129)—Refutation from Calvert's Death Certificate (pp 129-130)—A Remarkable Document (pp. 130-131)—Plaintiff's position in regard to Telegrams (p 131)—Defendants' Points arising out of Telegrams (pp 131-132)—Kumar's Condition on 8th morning (pp 132-133)—What are the Probabilities? (pp 133-134)—No Indication of Good Faith (pp 134-135)—What do the Telegrams indicate? (p 135)—What do the Prescriptions show (pp 135-136)

Calvert's Condolence Letter (p 136)—Certificate of Death (pp 137-138)—Defendants' Contention on the Documents (p 138)—Unusual Character of Condolence Letter (pp 138-139)—Satyendra's Denial of Knowledge of this Letter (pp 139-140)—Bibhabati Devi's "Pretended Ignorance" (pp 140-142)—When was the Condolence Letter written? (pp 142-143)—Where was the Condolence Letter? (pp 143-145)—Was Calvert present at Death? (pp 145-147)—No Independent Recollection (p 147)—Calvert's Letter to Lindsay (pp 147-148)—Condolence Letter no Confirmation of Death (pp 148-149)—Or of Cause of Death (pp 149-150)—Untrue Statements in Death Certificate (pp. 150-152)—"Inspired Falsehoods" (p 152)—Explanation of Bilary Colic in Death Certificate (pp 152-153)—Calvert's Three Documents Compared (pp 153-154)

Crawford's Certificate (pp 154-155)—Change of Bed-room on 7th Night (pp 155-157)

2 Cause of Kumar's death or apparent death

Cause of Kumar's Death or Apparent Death (pp 157-159)

3 Hour of alleged death

Hour of Alleged Death (pp 159-160)—Defendants' Documentary Evidence (pp 160-161)—Diary Entry (pp 161-162)—Kaliganj School Resolution (pp 162-163)—Estate Circular (pp 163-164)—Cutting from the "Bengalee" Newspaper (pp 164-165).

Death Telegram, its Significance (pp 165-167)—Plaintiff's Case regarding Death Telegram (pp 167-169)—Defendants' want of a Definite Case (pp 169-170)—Evidence of Barendra Banerjee (pp 170-171)—Other Evidence (pp 171-172)—Satyendra's Diary on this Telegram (p 172)—Case made by Counsel (pp 172-174)—Trial Judge's Finding Affirmed (pp 174-175)

Evidence of Ram Sing Subba (pp 175-176)—Defendants' Criticism (p 176)—Plaintiff's Tadbirkar (pp 176-177)—Wrong Description of Sasan (pp 177-178)—Denial of Admitted Incidents (pp 178-179)—"Meddlesome" and "Officious" Conduct (p 179)—Rani "Locked up" (pp 179-180)—Irresponsible Nature of Criticism (pp 180-182)

"Death" between 7 and 8 p.m. (p. 182)—Collapse about midday on Defendants' own Evidence (pp. 182-183)—Condition before Evening (pp. 183-184)—Bibhabati's Tears (pp. 184-185)—Supposed Buoyant Condition till the very last (pp. 185-186)—Dr B. B. Sarkar's Visit Its Significance (pp. 186-187)—A few Facts (p. 187)—Discrepant Evidence (pp. 187-189)—Improbability of Defendants' Story (pp. 189-190)—Entry in Dr Sarkar's Diary (p. 190)—Tarapada Banerji's Evidence (pp. 190-191)

Evidence of Maitra Group (pp. 191-192)—Mr Chaudhuri's Comments (p. 192)—Inadmissibility as *Res Gestae* (pp. 192-193)—Supposed Contradiction with other Evidence (p. 193)—Padmini Mohon Neogy (pp. 193-194)—Surendra Roy Chowdhuri (pp. 194-195)—"Unreal" and "Unnatural" Evidence (p. 195)—False Notions of Propriety Borrowed from the West (p. 196)—No Details of Condolence Meeting (pp. 196-197)—Recollections "Mixed up" (pp. 197-198)—Futility of Mr Chaudhuri's Argument (pp. 198-199)—False Analogy with Debabrata Mukherjee's Evidence (pp. 199-200)—Theory of Premature Report of Death (pp. 200-202)—Supposed Support of Defence Case by Maitra Group (p. 202)—Story of Missing Body if known at Sanitarium (pp. 202-203)—Might still Create no Suspicion (pp. 203-204)

Conclusion as to Hour of "Death" (pp. 204-205)

4 Evening Cremation

Alleged Cremation Procession in the Evening (p. 205)—All Relevant Factors Considered (pp. 205-206)—Theory of "Bashu mara" (p. 206)—Supported by Defendants' own Evidence (pp. 206-207)—Evidence of Kali Das Pal (pp. 207-208)—Plaintiff's Positive Evidence of Evening Procession (pp. 208-209)—Padmini Neogy (p. 209)—Alleged Inconsistency with previous Statements (pp. 209-210)—Other Grounds of Attack (pp. 210-211)—A Witness of Truth (p. 211)—Other Witnesses (pp. 211-219)

Story of Rain and Storm (pp. 219-220)—Three Previous Enquiries (pp. 220-221)—Suggestions of Procuring False Evidence (pp. 221-222)—No Procuring of False Evidence (pp. 222-223)—Sequel to Evening Procession (pp. 223-224)—Supposed Improbability of Substituted Body Involved in Plaintiff's Story (p. 224)

Plaintiff's Admission of Morning Cremation What it means (pp. 224-225)—Not an Integral Part of Plaintiff's Case (pp. 225-226)—Onus on Defendants (p. 226)—Defence Argument, a Piece of Sophistry (pp. 226-227)

Probabilities Considered (p. 227)—Plaintiff's Evidence as to Missing of Body (pp. 227-228)—Sitanta Kumar Bagchi (pp. 228-229)—Supposed New Case regarding Sasan (pp. 229-230)—A Meaningless Theory (p. 231)—Question of Route (pp. 231-232)—Other Witnesses of Evening Cremation (pp. 232-233)—Kiron Chandra Mustafi (p. 233)—Biseswar Mukherjee (pp. 233-234)—Jatindra Chandra Chakravarti (pp. 234-235)—Chandra Singh (pp. 235-236)—Manmatha Nath Chowdhury (pp. 236-238)

General Attack on the Evidence (p. 238)—Alleged Improbabilities of the Story (pp. 238-239)—Old v. New Sasan (p. 239)—Charge of "Bias" against the Judge (pp. 239-240)—No Change of Case on Plaintiff's Side (pp. 240-241)—Defendants' Case of a Single Sasan (pp. 241-242)—Plaintiff's Evidence of Two Sasans (pp. 242-243)—Old Sasan still in use in 1909 (pp. 243-244)—Tutored Evidence for the Defence Frederick Lofts (pp. 244-245)—James Emil Morgenstern (pp. 245-246)—Jhora between Old and New Sasan (pp. 246-248)—Good Reasons for Avoiding New Sasan (pp. 248-249)—Supposed Absence of Huts and Sheds for Shelter (pp. 249-250)—Non-existence of New, Slaughter House (pp. 250-251)

5. Story of Rain and Storm

Alleged Rain and Storm on the Night of the 8th May (pp. 251-252)—Value of Oral Testimony (p. 252)—Evidence of Defence Witnesses (pp. 252-253)—No Particular Reason for Remembering (pp. 253-254)—Difference in the Case of Plaintiff's Witnesses (p. 254)—Plaintiff's Evidence Weighed (pp. 254-255)—Story about

Anukul Chatterji (p 255)—Conflicting Defence Version (pp 255-256)—Supposed Corroboration by Kalidas Pal (pp 256-257)—Panchanan Moitra's Story (pp 257-258)—Corroboration of Plaintiff's Version (pp 258-259)—Defence Case given away by their witness—Fakir Roy (p 259)—"Incredible" Re-examination (p 260)—Evidence of Susila Sundari Devi (p 261)—Sailendra Kumar Kusari (p 262)

Story of Rainfall Records (pp 262-263)—System of Recording (pp 263-264)—Plaintiff's Charge of Tampering with Municipal Record (pp 264-265)—Counter-charge by Defendants (p 265)—Father Peel's Evidence (pp 265-266)—Uncertain Conclusions (pp 266-267)—No Uniformity of Rainfall (pp 267-268)—Dr B B Sarkar's Diary (p 268)—Defence Theory not established (pp 268-269)—Scotland Yard Examination of Municipal Rain-record (p 269)—Physical Characteristics of Disputed Entry (pp 269-270)—Text of Scotland Yard Report (p 270-271)—Story of Production of Record in Court (p 271)—Defendants' Halting Explanation (p 272)—Plaintiff's Conduct, a Striking Contrast (pp 272-273)—Tampering the Work of Defendants (p 273)—Botanical Gardens Register (p 273)—An Unreliable Record (pp 274-275)

Final Conclusion (p 275)—No Changes in Plaintiff's Case (pp 275-276)

6 Morning Cremation

The Morning Cremation of the 9th May (pp 276-277)—Defence Evidence Analysed (pp 277-278)—Judge's Findings (pp 278-279)

Devastating Effect of Dr Pran Krishna Acharyya's Evidence (pp 279-280)—Attempted Explanation of his visit (pp 280-282)—Plan miscarries (pp 282-283)—Futile Criticism of Evidence (pp 283-284)—Unconvincing Suggestions (pp 284-285)—If Dr Acharyya saw body upstairs (pp 285-287)—Facts established (p 287)—How far rebutted by Defence Evidence (p 287)

Bibhabati's Account of Incidents on Night of Death (pp 287-288)—Satyendra's Evidence (pp 288-289)—Bibhabati's Fits (pp 289-290)—Other Evidence (p 290)—Satyendra's Account in his Diary (p 291)—Arrival of Sasan-Bandhus (pp 291-293)—No Night Cremation (p 293)—An Unexplained Fact (pp 293-294)—Defence Story of Face being uncovered (pp 294-295)—Suspicious Uniformity in Evidence (pp 295-297)

A few Typical Witnesses (pp 297-298)—Shyamadas Banerjee (pp 298-299)—More about Body being Upstairs (pp 299-300)

Jagat Mohini, the Town Nurse (p 300)—From "Dasi" to "Devi" (pp 300-302)—Sacred Thread and Ganges Water (pp 302-303)—Going to Sasan a Myth (pp 303-304)—A Picturesque Fiction (p 304)

R N Banerjee *alias* Bebul (p 305)—Inexplicably overlooked at Earlier Stages (pp 305-306)—Bar Library Discussion (pp 306-307)—Presence at Cremation not at all a Fact (p 307)—Attending *Kakina Shad* instead at Kurseong (pp 308-309)—An Over-clever Witness (p 309)—Reference to Siddheswar De (pp 309-311)—Talk with "Brother Bhnpen" (pp 311-312)—Dogmatic Statement about Shad at Sasan in 1905 (p 312)—Affected air of Truthfulness (pp 312-313)—"Cement Staircase" (pp 313-314)—Patent marks of Tutored Evidence (pp 314-315)

Gita Devi called to support R N Banerjee (pp 315-316)—A "Conscripted" Witness (p 316)—"Voluntary" Character of her Evidence (pp 316-317)—Alleged Route of Funeral Procession by Thorn Road to be visible from Balen Villa (pp 317-318)—A mere "After-thought" to "fit in Gita Devi" (pp 318-319)—"Circumstantiality" of Gita Devi's Evidence (pp 319-320)—Supposed Corroboration of Kasiswari Devi's visit to "Step Aside" (p 320)—Untutored Evidence as to Scene at Balen Villa (pp 320-321)—A Graphic and Truthful Account (pp 321-322)—Bepin Khansama's Realistic Fiction (pp 322-323)—Kasiswari Devi's Visit to "Step-Aside" a Sheer Concoction (pp 323-324)

Other "Step-Aside" Witnesses (p 324)—Rayendra Nath Sett (pp 324-325)—Interview with Plaintiff, a True Account in Plaintiff's Memorial (pp 325-326)—Present Evidence to the contrary a Concoction (p 326)—No answer to Case of

Substituted Dead Body (pp 327-328)—Indiscriminate call for Sasan-Bandhus (p 328)

Proceedings at the Sasan (p 328)—Widest Publicity given to Funeral Procession (pp 328-329)—Object behind it (p 329)—Story of, Rites and Ceremonies avoided at earlier stage (pp 329-331)—A "Dangerous Topic" in view of Plaintiff's Case (p 331)—Plaintiff's Witnesses (pp 331-332)—No Contradiction with previous statements (pp 332-333)—Swami Onkarananda (pp 333-334)—Basanta Kumar Mukherjee (pp 334-335)—Nalini Kanta Chakravarty (p 335)

Defence Evidence of Cremation Rites and Ceremonies—Shyamadas Banerjee (pp 335-336)—Birendra Chandra Banerjee (p 336)—Performance of Mukhagni (p 337)—Birendra's Questionable Right to perform Mukhagni (pp 337-338)—Recital of Mantras Birendra's Improvisation of a Second Priest (pp 338-339)—Dr Ashutosh Das Gupta (p 339)—Satyendra's Failure of "Definite Recollection" (pp 339-340)—Reticence of Earlier Commission Witnesses about Mantras (p 340)—First Mention by Kana Ram Mukherjee (pp 340-341)—Gradual Evolution of the Story of Mantras (pp 341-342)—Other Cremation Rites (p 342)—Free Play of Imagination (pp 342-343)—Satyendra's Lying Quibbling about Hour of Return from Cremation (pp 343-344)—A Hurried Cremation (p 344)—"Shawl" Incident (pp 344-345)

Haran Chandra Chakladar (p 345)—Present Evidence and Previous Statement to Lindsay compared (pp 345-346)—Amazing lack of Straightforwardness (pp 346-347)—Pretence of Bona-fides (p 347)—Extraordinary Interest in Second Kumar at Darjeeling (pp 347-348)—Pretended Detachment of Defence Witnesses from Satyendra (pp 348-350)

Final Conclusion on Morning Cremation (pp 350-351)

7. Story of Rescue

Alleged Rescue by Sannyasis (pp 351-352)—Amazing Story of Rescue by Darsan Das (p 352)—The Story in Brief The Darjeeling Part (pp 352-353)—"Blanket Factory" (p 353)—Hill-man's Hut (pp 353-354)—Plaintiff's own Account (pp 354-355)—Mr Chaudhuri's Comments (pp 355-356)—Earlier Case of a Single Rescuing Sadhu (p 356)—Belated Calling of Darsan Das as a Witness (pp 356-358)—Genuineness of Identity admitted by Defence Witnesses (pp 358-359)—Not a Tutored Witness (p 359)—Corroboration (p 359)—Location of "Blanket Factory" (pp 360-361)—Right Conclusion by Judge (pp 361-362)

Summary of Findings on Darjeeling Chapter (p 362)

Intervening Years : Loss of Memory

From Darjeeling to Buckland Bund (pp 362-363)—Alleged "Loss of Memory" Its bearing on the Question of Identity (p 363)—Not a psychological "Impossibility" (p 364)—Only Question, if this was a fact (p 364)—Plaintiff's Account not to be subjected to Meticulous Scrutiny (pp 364-365)

Plaintiff's own Version of his life during this period (pp 365-366)—Darsan Das' Account (p 366)—Supposed Inconsistencies in Versions of other Witnesses (pp 366-368)—Jhaluki Incident (pp 368-369)—Alleged Inconsistency with Memorial Version (pp 369-370)—How far it affects Plaintiff's Case of Loss of Memory (pp 370-371)—Overcoming of "Maya" (pp 371-372)—Revel of "Old Memories" at Buckland Bund (pp 372-373)—Case in point (p 373)—Conclusion (pp 373-374)

Identity Chapter

Identity Chapter (p 374)—Mr Chaudhuri's Criticism of Judge's treatment (pp 374-375)—Reliance on "Direct Evidence" (pp 375-376)—Value of "Recognition" as evidence of Identity (p 376)—Honesty of Jyotirmoyee Devi (pp 376-377)—Mental Identity (p 377)—Identity not inferred from Bare Resemblance (pp 377-378)—Question before the Court (p 378)

Direct Evidence—Recognition

Evidence of Recognition Analysed (pp 378-379)—Tests for Appraising such Evidence (p 379)

Recognition by Family Members (pp 379-380)—Recognition by Others (p 380)—Judge's Cautious Approach (pp 380-381)—Not a victim of "Hypnotism" (pp 381-382)—Relations who recognised (pp 382-383)—Lack of Independent Witnesses on Defendants' side (pp 383-384)—Elements in Real Recognition (p 384)—"Spontaneity" of Recognition and non-recognition (pp 384-385)

Denial of Identity by Second Ranı (pp 385-386)—Already Committed (pp 386-387)—Denial of Ranı Satyabhama Devi's Recognition (p 387-388)—Ranı Satyabhama Devi's Letter to Collector (pp 388-389)

Nature and Character of Plaintiff's Evidence of Recognition (p 389)—Contrast with Defence Evidence (p 389)

Theory of "Utter Dissimilarity"

Defence Theory of "Utter Dissimilarity" (pp 389-390)—A mere Fiction to discount Story of Rumour (pp 390-391)—An Absurd Explanation (p 391)—Contradicted by Defendants' Pleadings and Evidence (pp 391-393)—Concession of Slight Similarity in Argument—as Insincere as Unmeritorious (p 393)

Defence Evidence—a few Typical Samples (pp 393-395)—Physical Resemblance (pp 395-396)—Situation at Jaidebpur on Plaintiff's Return, Striking Proof of Honest Recognition (pp 396-397)—Defence Criticism based on Memorial Version (p 397)—But facts admitted in Needham's Report (pp 397-398)—Version of Defence Witnesses (pp 398-399)—Shameless Equivocation (pp 399-400)—Needham's Report, the strongest Refutation "Report of a Believer" (p 400)—Futile Attempt to belittle the Report (pp 400-401)—Conduct of Jogendra Banerjee and Mohini Chakravarty (pp 401-402)

"Atma-Parichaya"

Atma Parichaya not a staged Demonstration (pp 402-403)—True Significance of the Event (pp 403-404)—Examination of Plaintiff's Marks (p 404)—Neither "Improbable," nor "Unnatural" (pp 404-405)—Situation Recalled (pp 405-406)—Attitude of the Family (pp 406-407)—Non-Committal Attitude of Estate Officials (p 407)—False Case made by Defendants (pp 407-408)

Counsel's Taunt at the Judge, "Dacca Shakespeare" (p 408)

Definite Change of Attitude of Court of Wards Officials from after 5th May (pp 408-409)—Mohini Chakravarty's Report of 6th May (pp 409-410)—Evidence of Harendra Kumar Ghose (p 410)—"Bird-shooting" Episode (pp 410-411)

Conclusion on Direct Evidence of Identity (p 411)

Bodily Features

Bodily Features and Physical Marks (p 411)—Mr Chaudhuri's Obsessions (pp 411-412)—Judge's Method of Treatment (p 412)—Evidence of Photographs (pp 412-413)—Marks (p 413)—No Suggestion of "Manufactured" Marks (pp 413-414)—Defence Denial of Marks on Second Kumar (p 414)—"Irregular Scar" over Left Outer Ankle (pp 414-415)—Lame Attempt to sustain Insurance Mark (p 415)—Medical Examination of Plaintiff (pp 415-416)—General Characteristics (pp 416-417)—"Mathematical Certainty" (p 417)

Mental Identity

Mind of the Plaintiff (pp 417-418)—Test of Mental Identity, How to be applied (pp 418-419)—Imaginary Kumar Set up by Defendants (p 419)—Avoidance of Memory in Cross-Examination (pp 419-420)—Defence Picture of the Real Kumar (pp 420-421)—A "Well-educated, Well-polished 'Aristocrat'" (pp 421-422)

Literacy

Kumar's Literacy and Education (p 422)—No Change of Case on Plaintiff's Side (pp 422-423)—Varying Versions of Defendants (pp 423-424)—Forged Bengali Letters produced by Defendants (pp 424-425)—Judge's Conclusions accepted (p 425)

Is the Plaintiff a Bengalee? (p 425)

Final Conclusion on Issue of Identity (p 426)—Defence Case of Plaintiff being a Punjabee (p 426)

Question of Limitation

Question of Limitation (pp 426-427)—Amendment of Plaint (p 427)—Suit Governed by Art 144 (pp 427-429)

Conclusion (p 429)

Supplementary Observations *re* Costello, J.'s Judgment

Biswas, J's Supplementary Statement (p 430)—Costello, J's Judgment sent out from England (pp 430-431)—A Full Bench Ruling (pp 431-432)—Questionable validity of the judgment (p 432)—New Rule (pp 432-433)

Introductory

Judgment Begins (p 435)—Plaintiff's Case (pp 435-436)—Defendants' Case (pp 436-437)—Limitation (p 437)

Atmosphere at Dacca during Trial (pp 437-438)—Difficulties created by the Parties (pp 438-439)—Trial Court's Unsatisfactory Mode of Approach (p 439)—Honesty of Jyotirmoyee Devi (pp 439-440)—No Adequate Reasons for Accepting her Evidence (pp 440-441)—Differential Treatment of Evidence on Either Side (pp 441-442)—Order of Treatment (pp 442-443)

Darjeeling Chapter—Illness

Darjeeling—Illness (p 443)—Materiality of Cause of Death (pp 443-444)

Plaintiff's own Account of his Illness (pp 444-445)—Different Version given to Lindsay (p 445)—Lindsay's Memorandum (pp 445-448)—Still Other Versions (p 448)—Story of Corrosive Poison (pp 448-449)

Plaintiff's Evidence wholly Unreliable (pp 449-450)

Defendants' Evidence In Chronological Sequence (p 450)—6th May (pp 450-451)—7th May (pp 451-452)—8th May (pp 452-455)—9th May (pp 455-456)—10th May (p 456)—Cremation and Death Certificate (p 457)—Calvert's Letter to Lindsay (pp 457-458)

Discrepancies in Defendants' Oral Evidence (pp 458-459)—True Method of Testing such Evidence (pp 459-460)—Calvert's Letter and Certificate on Different Footing (p 460)—Attack on Calvert's Credit (p 460)—"Fourteen Days' Illness" (pp 460-462)—No explaining away of Condolence Letter (pp 462-463)

The Arsenic Prescription (p 463)—Theory of Intention to cause Death (pp 463-464)—Possible use as a Cloak (pp 464-465)—Biliary Colic—Cause and Treatment (pp 465-466)—Medical Evidence (pp 466-467)—Effect of Expert Evidence (pp 467-468)—Refusal of Hypodermic Injection (pp 468-469)—"Watery Motions with Blood"—Possible Explanation (pp 469-471)

Symptoms of Arsenic Poisoning (pp 471-473)—Dr Denham White's Opinion, not helpful (pp 473-474)—Inconsistent Findings of Trial Judge (p 474)—Alleged Conspiracy to Murder (p 474)—Refutation of Theory (p 475)—Possible Motives (p 476)

Conclusion (pp 476-477)

Procuring of Certificates of Death and Cremation (pp 477-481)

Time of Death

Time of Death (p 481)—Defence Evidence of Death at Midnight (pp 481-482)—Judge's Reasons in Support of Death at Dusk examined (p 482)

Evidence of Ram Sng Subha (pp 482-483)—A Deliberate Lie (pp 483-485)—Visit of Dr B B Sarkar (pp 485-486)

Other Reasons Course of Illness (pp 486-487)—No Reply to Bara Kumar's Telegram (p 487)—Inference from Dr B B Sarkar's Visit (pp 487-489)

Telegram of Death (pp 489-490)—Defence Explanation for non-production (pp 490-491)—Oral Evidence as to Contents (pp 491-492)—Hour of Receipt at Jaidebpur (pp 492-493)—No Cooking at "Step-Aside" that night (pp 493-494)

Evidence of Prof S N Maatra (pp 494-495)—A Freak of Memory (pp 495-496)—Other Witnesses of Maatra Group (p 496)—Honest but Mistaken (pp 496-497)

Judge's Wrong Method of Approach (pp 497-498)—Kalidas Pal's Evidence (p 498)—Madhusudan Mukherjee (pp 498-499)—Absence of Prescription from Dusk to Midnight (p 499)

Alleged Evening Cremation

Alleged Evening Cremation (pp 499-500)—Plaintiff's Version (p 500)—Story how far probable (p 501)

Procuring of another dead body (pp 502-503)—Almost an Impossibility (p 503)

Alleged Rain and Storm

Alleged Rain and Storm (p 504)—Government Weather Reports (pp 504-505)—St Joseph's and St Paul's Registers (p 505)—Municipal Record tampered (pp 505-506)—Botanical Gardens Register (p 506)—Dr B B Sarkar's Diary (pp 506-507)—Father Peel's Evidence (pp 507-508)—Fakir Roy's evidence (pp 508-509)

Conclusion No Heavy Rain and Storm (pp 509-510)

Oral Evidence on Plaintiff's Side (p 510)—How to test such Evidence (p 510)—Belated Discovery of the Witnesses (p 510-511)

Other Features of the Evidence (pp 511-512)—Padmini Mohan Neogy (pp 512-513)

Other Witnesses of Plaintiff (pp 513-514)—Jatindra Chandra Chakravarty's Group (pp 514-516)—Procured Evidence (p 516)

False Story of Shelters (p 517)—Non-existent Old Slaughter House (pp 517-518)—No Sheds to shelter in (p 518)

Unconvincing Evidence of other Witnesses (pp 518-519)—Purchase of Funeral Requisites (pp 519-520)—Witnesses who saw the Evening Procession (pp 520-521)—Evidence wholly unreliable (p 521)

Story of Rescue

Story of Rescue (pp 521-522)—Plaintiff's State of Knowledge about Alleged Rescue (pp 522-523)

Different Versions Story as given to Lindsay (p 523)—Story in Pamphlets (p 523)—Story in Defamation Case (pp 523-524)

Visit of Dharam Das Naga to Dacca (pp 524-525)—Alleged Reason for Abrupt Departure (pp 525-526)—Upshot of the Evidence Change of Case (pp 526-527)

Story of Darsan Das *alias* Gopal Das (pp 527-528)—Clear Indications of False Evidence (pp 528-530)—Strange Conduct of Supposed Rescuers (p 530)—Suspicious Manner of coming to depose (p 531)

Corroborating Witnesses Unconvincing Evidence (pp 531-532)—Location of Blanket Factory (pp 532-534)—Reasons for rejecting Darsan Das' Evidence (pp 534-535)

Story of Rescue a False One (p 535)

Morning Cremation

The Morning Cremation (p 535)—Dr Pran Krishna Acharyya's Evidence for Plaintiff (p 536)—Answers to Lindsay (pp 537-538)—Glaring Contradictions in Evidence (pp 538-539)—Probability of his finding Body Downstairs (pp 539-540)—Purpose of his Visit (p 540)

Plaintiff's Witnesses of Morning Cremation (p 540)—Recording of previous statements, at Darjeeling (pp 540-541)—Instructions from Secretary, Board of Revenue (pp 541-543)

"Story of the Sadhu" (pp 543-544)—No attempt to influence Witnesses (p 544)

Discrepant Evidence in Court (pp 544-545)—Khetra Nath Mukherjee's Evidence and Previous Statement Compared (pp 545-546)—Material Differences (pp 546-547)—Basanta Kumar Mukherjee Evidence in Court (p 547)—Previous Statement (pp 547-548)—Nalini Kanta Chakravarty (pp 548-549)

Alleged discrepancies in Defence Evidence (p 549)—Performance of rites and ceremonies (pp 549-550)—Judge's reasons for disbelieving defence version (pp 550-551)

Kasiswari Devi and flinging away of ornaments by Bibhabati (pp 551-552)—Gita Devi's account (pp 552-553)—Kasiswari Devi's Visit (p 553)—Omission of her name in Satyendra's diary (pp 553-554)

No evidence as to body being downstairs (p 554)—Rajendra Nath Sett's evidence (pp 554-557)—No material contradictions (pp 557-558)

Haran Chandra Chakladar (p 558)—Chakladar's statement to Landsay (pp 558-560)—Apparent contradictions (p 560)—Risk of taking a faked body to cremation (pp 560-561)

Summary of Conclusions on Darjeeling Chapter (pp 561-563)

Intervening Years—I

Intervening years—1 (p 563)—Plaintiff's first connected statement in Memorial (pp 563-564)—Story given in Court (pp 564-565)—Statement in cross-examination (pp 565-567)—Case put to Medical Experts (pp 567-568)

Loss of memory (p 568)—No evidence of loss of memory as a fact (p 568)—Jhalki incident (pp 568-570)—Rangpur meeting with Harimohan Basak (p 570)—Entire absence of evidence to support plaintiff's story (pp 570-571)—Alleged reason for return home (p 571)

Intervening Years—II

Intervening Year—2 Return of Darjeeling party (pp 571-572)—Conduct of Satyendranath Banerjee on return from Darjeeling (pp 572-573)—Reckless accusations against defence witnesses (pp 573-574)

Satyendra's Diary

Satyendra's diary (p 574)—Object of opening the diary (pp 574-575)—Manner of production in Court (p 575)—Missing pages (pp 575-576)—Inferences from entries produced (pp 576-577)—Satyendra's conduct towards Bibhabati A devoted brother (p 577)—No proof of depravity or of improper motives (pp 577-578)—What the diary really shows (p 578)

Various alleged happenings Rumours of second Kumar being alive (pp 578-579)—Rani Satyabhama's letter to Maharaja of Burdwan (pp 579-580)—Maharaja's reply (pp 580-581)—Story of *Kushaputtalika* (p 581)—Facts negating story (pp 581-582)—Alleged receipt of anonymous letter by Bara Kumar (pp 582-583)—Alleged advent of a saunyasī at Madhab Bari (p 583)—Alleged quest of Akshoy Roy (p 584)—Alleged revelation by Moumī saunyasī in 1917 (p 585)—Origin of 1917 rumour (pp 585-586)

Plaintiff's Arrival in Dacca

The arrival of the plaintiff in Dacca and the preferment of his claim (pp 586-587)—Abandonment of Memorial version of plaintiff's return (pp 587-588)—Plaintiff's present version (pp 588-589)

Object in returning to Dacca (p 589)—Visit to Kasimpur and Jaidebpur (pp 589-590)—Strange behaviour (pp 590-591)

Declaration of Identity

Remarkable conduct of Jyotirmoyee Devi (p 591)—No material change in appearance between plaintiff and Kumar (p 592)—Still no recognition at first meeting (pp 592-593)—A second meeting only a strong suspicion

(pp 593-595)—Plaintiff's next visit to Jyotirmoyee Devi's house (pp 595-597)—Inspection of marks (pp 597-598)—Declaration of Identity (p 598)—Incredible conduct A Hollywood picture (pp 598-599)—Story itself not consistent (p 599)—Object of demonstration (pp 599-600)

Needham's report to Lindsay (pp 600-602)—Mohini Mohan Chakravarty's report to Needham (pp 602-603)—Alleged change in attitude of Estate officials (p 603)—Pretended detachment of family members (p 604)

Alleged test re bird-shooting incident (pp 604-605)—Plaintiff's supposed inability to answer test questions (pp 605-606)—Vigorous propaganda by plaintiff's party (p 606)

Sisters' petition for enquiry Lindsay's attitude (pp 606-607)—Next step Plaintiff's interview with Lindsay (pp 607-608)—No further move till long after (p 608)—Conduct of Satyendra and of Government officials (pp 608-609)—Lindsay's report of 10th May (pp 609-611)—Satyendranath Banerjee's conduct (pp 611-612)—Lindsay's Impostor notice (p 612)—Action 'fully justified' (pp 612-613)

Recognition

Effect of propaganda on evidence of recognition (p 613)—Failure to apply true test of recognition (p 614)—Typical illustrations (pp 614-615)—Need for critical scrutiny of evidence of recognition (p 615)

Supposed recognition by Rani Satyabhama Devi (pp 615-616)—Rani Satyabhama's eye-sight (p 617)—Her letter to Bibhabati (pp 617-618)—Letter to Collector of Dacca (pp 618-620)—"Cloven hoof" of the lawyer (p 620)—Rani Satyabhama's *svadh* (pp 620-621)—Conclusion No independent recognition by Rani Satyabhama (p 621)

Evidence of recognition by Jyotirmoyee Devi (pp 621-622)—Question of Jyotirmoyee's honesty (p 622)—Probability of conspiracy to run an impostor (pp 622-623)—Relevant considerations (pp 623-624)—No insurmountable obstacles (p 624)—Jogendra Nath Banerjee's belief in honesty of Jyotirmoyee (pp 624-625)—True test her own evidence and conduct (p 625)—Evidence not frank nor truthful (pp 625-626)

Sarajubala Devi (pp 626-628)—Pura Sundari Devi (pp 628-629)—Sarojini Devi (p 629)—Sonamoni Devi and Sudhangsu Bala Devi (pp 629-630)—Kedareswar Bhattacharjee (p 630)—Radhika Mohan Goswami (pp 630-631)—Kumud Mohan Goswami (pp 631-632)—Lal Mohan Goswami (pp 632-633)—Suresh Chandra Mukherjee (pp 633-634)—Basanta Kumar Mukherjee (p 634)—Biloo and Sagar (p 634)—Chandra Sekhar Banerjee (pp 634-635)—Kulada Sundari Devi (p 635)—Akhil Chandra Pakrashi (p 636)—Kamal Kamini Devi (p 636)—Ananta Kumari Devi (p 636)—Sivamohini Devi (p 636)

Witnesses other than Kumar's relatives (p 637)—Mokshada Sundari Devi (p 637)—Rebati Mohan Ghosh (pp 637-638)—Parswanath Nag Biswas (pp 638-639)—Raj Kumar Mukhati (p 639)—V T Stephen (p 639)—Manindra Mohan Basu (pp 639-640)—Mesbahuddin Ahammad (p 640)—Hemendra Kushore Acharyee Chowdhury (pp 640-641)—Nabendra Nath Basak (p 641)—Jogesh Chandra Roy (pp 641-642)—Charu Chandra Das Gupta (pp 642-643)—Hemendra Lal Das (p 643)—Bhupendra Mohan Ghosh (p 643)—N K Nag (pp 643-646)—Ramesh Chandra Chaudhuri (pp 646-647)—Surendra Chandra Bhattacharjee (p 647)—Rajendra Kumar Roy Chaudhuri (p 647)—Braj Gopal Basak (p 647)—Abul Kasem (p 647)—Ananda Chandra Ganguli (pp 647-648)—Jogesh Chandra Roy (p 648)—Hiranmay Biswas (pp 648-649)—Kali Mohan Sen (p 649)—Gobinda Chandra Roy (p 649)—Narendranath Mukherjee (p 650)

Value of the evidence of recognition by intimate acquaintances (p 650)—Old officers of Bhowal Estate (pp 650-651)

Defence evidence as to recognition (p 651)—Sarada Prasanna Ghosh (pp 651-652)—Bibhabati Devi (pp 652-653)—Sukumari Devi (p 653)

Physical Identity

Evidence of Physical Identity Initial difficulty (pp 653-654)—Effect of lapse of time (p 654)—Comparison of bodily features (pp 654-664)

Plaintiff's account (pp 664-666)—Medical witnesses Dr Narendra Nath Mukherjee (pp 666-667)—Dr MacGulchrist (p 667)—Dr Bradley (p 668)—Dr Sailendra Kumar Sen (pp 668-670)

Effect of medical evidence at close of plaintiff's case (pp 670-671)—Subsequent joint examination by Drs Denham-White, Thomas and Chatterjee (p 671)—Dr K K Chatterjee's note (pp 671-672)—Additional marks found by Dr Chatterjee (p 672)—Gumma marks (p 673)—"Bubo" mark (pp 673-674)

Other marks (pp 674-675)—Vaccination marks (p 675)—Gait (p 675)—Voice (p 675)—Size of shoes (pp 675-676)

Summary of results on Comparison of Bodily Features (p 676)

Mental Identity

Mental identity (pp 676-677)

Defence attitude in cross-examination of plaintiff (pp 677-679)—Differential treatment of oral evidence on either side (p 679)

Evidence of identity as given by plaintiff himself (pp 679-680)—Criticism of plaintiff's cross-examination (pp 680-681)—Ignorance of English (p 681)—Ignorance of English articles of clothing (p 682)—Evidence of roaching during plaintiff's deposition (pp 682-683)—Bengali speech (p 683)—Hindi accent (p 683)—Wrong grammar (pp 683-684)—Mispronunciation of Bengali names (pp 684-685)—Pronunciation of numerals (pp 685-686)—Supposed inability to count (pp 686-688)

Ignorance of games and sports (p 688)—Polo (pp 688-689)—"Polo" Scurry (pp 689-690)—Horse-racing (pp 690-692)—Billiards (pp 692-693)—Shooting (pp 693-699)—"Guest House" (p 699)—Names of officials (p 699)

Ability to read and write (p 700)—Evidence of plaintiff's present knowledge (pp 700-701)—Extent of Ramendra Narayan Roy's literacy (pp 701-702)

No evidence of absolute illiteracy (pp 702-705)—Handwriting (p 705)—Expert opinion sought by defendants (pp 705-706)—Mr S C Choudhury's report (pp 706-708)

Expert approached later by both sides (pp 708-709)—Expert's breach of professional etiquette Suspicious evidence (p 709)

Value of earlier report (pp 709-710)—"Wildest" guess-work (pp 710-711)—Suspicious features in plaintiff's handwriting (p 711)

Conclusion Identity not established (pp 711-712)

Other evidence of mental identity (p 712)—Alleged recognition of persons by plaintiff (p 712)—Opportunity of instruction by companions (pp 712-715)—Alleged memory of past incidents (pp 715-717)

Summing up

Summing up on the case (pp 717-718)

Defence case as to plaintiff being Mal Singh of Aujla (pp 718-719)—Defence witness Dharam Das Naga (pp 719-720)—Identification of a wrong photograph (pp 720-721)

Conclusion

Conclusion (p 721)

Repl to Biswas, J's statement as to validity of Costello, J's Judgment (pp 721-723)

COSTELLO, J'S JUDGMENT (pp 725-872)

Judgment begins (p 725)—Magnitude of the Case (p 726)—History of the Family (pp 726-728)—Plaintiff's Case in Pleint (pp 728-730)—Defence of Bibhabati Devi in her Pleading (pp 730-731)—Ananda Kumari Devi's Case (p 731)—Amendment of the Pleint (pp 731-732)—Issues in the Case (p 732)

Plaintiff's Case at the Trial

Plaintiff's Case as made at the Trial (pp 732-733)—Happenings at Darjeeling (p 733)—Intervening Years at Jaidebpur (p 734)—Rumours (p 734)—Rani Satyabhama's Letter to Maharaja of Burdwan (p 735)—Plaintiff's Arrival at Dacca (pp 735-736)—Visit to Kasimpur and thence to Jaidebpur (p 736)—At Jyotirmoyee Devi's House (p 737)—Visit to Saibahini Devi's House at Dacca (p 737)—Back to Jyotirmoyee Devi's House (pp 737-738)—Examination of Marks (pp 738-739)—Declaration of Identity (p 739)—Needham's Report to Landsay (pp 739-740)—Alleged Report by Sheridan (p 740)—Big Meeting on 15th May, 1921 and After (p 740)—Plaintiff's Interview with Landsay (pp 740-741)—Landsay's "Impostor Notice" (p 741)—Stay at Dacca (p 741)—Tattoo-mark on Plaintiff's Arm (pp 741-742)—Satyabhama's Letter to Bibhabati Devi (p 742)—Rani's Letter to Collector Drummond (pp 742-743)—Jyotirmoyee Devi's Request for an Interview with K C De (p 743)—Memorial to Board of Revenue (p 743)—Plaintiff in Calcutta (pp 743-744)—Collection of Rents (p 744)

Defendants' Case at the Trial

Defendants' Case as made at the Trial (p 744)—Death at Midnight and Cremation in the Morning (pp 744-745)—Denial of Rumours prior to 1917 (p 745)—Theory of Utter Dissimilarity (p 745)—Kasimpur Visit (p 746)—Visits to Jaidebpur (p 746)—Declaration of Identity the Outcome of a Conspiracy (p 746)—Propaganda and Mass Suggestion (p 747)—Defamation Case of Dr Ashutosh Das Gupta (p 747)—Plaintiff's Delay in Asserting his Claim (pp 747-748)

Events after Declaration of Identity

Important Events Subsequent to Declaration of Identity (p 748)—Conduct of Satyendranath Banerjee (pp 748-749)—Activities at Darjeeling (p 749)—Action by Court of Wards (p 749)—Warning Notices by Landsay (pp 749-750)—Confidential Circulars and Orders (p 750-752)—Section 144 Cr P Code Proceeding (pp 752-753)—Defendants' Attempts to Secure and Suppress Evidence (pp 753-754)

Punjab Enquiry as to Plaintiff's Identity

Punjab Enquiry as to Plaintiff's Identity (pp 754-755)—Punjab Statement of Dharam Das (p 755)—Alleged Bogus Dharam Das Produced in Court by Defendants (pp 755-756)—Non-production of Documents by Defendants (p 756).

Features of the Case

Features of the Trial (pp 756-757)—Conduct of the Case (pp 757-758)—Trial Court's Judgment (p 758)—Enumeration of Topics for Consideration (pp 758-759)—Conclusions of Trial Judge as Summarised by him (pp 759-760)

Defence Counsel's Strictures "Unjustifiable" and "Regrettable" (pp 760-761)—Real Question for Decision in the Appeal (p 761)—Position of the Appellate Court (pp 761-762)—Distinctive Features of Present Case (p 762)

Contentions of the Parties : Appellants' Case

Appellants' Contentions in Broad Outline (pp 762-763)—Question of Identity Its True Bearing (pp 763-764)—Darjeeling Chapter (p 764)—No Independent

Findings by Trial Judge on Darjeeling Topics (p 764)—“Death or Apparent Death” (pp 764-765)—Time of “Death” (pp 765-766)—Evening Cremation and its Failure (p 766)—Rain and Storm (p 766)—Burning of Substituted Body (pp 766-767)—Rescue by Sannyasis (p 767)—Identity made the Main Basis of Decision (pp 767-768)—Trial Court’s Treatment of Question of Identity (p 768)—Analysis of Evidence as to Identity of Body (pp 768-770)—Identity of Mind (pp 770-771)—Identity “Otherwise Reached” What is the “Otherwise”? (p 771)—Judge’s Conclusion A Vicious Circle (pp 771-772)—Recognition by Jyotirmoyee Devi the whole Foundation of the Judgment (pp 772-773)—Two-fold Onus on Plaintiff (p 773)—Admitted Morning Cremation Its Effect on Plaintiff’s Case of Evening Cremation (pp 773-774)—No Evidence given of a Substituted Body in Morning Cremation (p 774)—Balance of Probabilities (pp 774-775)

Respondent’s Case

Respondent’s Contentions in Broad Outline (p 775)—Independent Examination of Darjeeling Chapter (p 775)—Real Basis of Finding on Identity (pp 775-776)—Recognition by Jyotirmoyee Devi not the only Basis (p 776)—Nor mere Opinion Evidence (p 777)—Darjeeling Chapter considered apart from Identity (p 777)—Illness of Second Kumar (p 777)—Hour of “Death” and Evening Procession (pp 777-778)—Morning Cremation (pp 778-779)—Defence Failure to Disprove Identity by Proof of Death and Cremation (p 779)—Finding on Darjeeling Chapter (pp 779-780)—Respondent’s Answer to General Criticism of Judgment (p 780)—Misrepresentation of Judge’s view on Physical Identity (pp 781-782)—Absence of Explanation of Loss of Memory or Cyst not material (p 782)—Evidence of Recognition duly considered (pp 782-783)—Photographs (p 783)—Identity not assumed in considering Marks (p 783)—Identity of Mind fully discussed (p 783)—Summary of Main Arguments on Either Side (pp 783-784)—Proper order of Treatment Indicated (p 784)

I. Darjeeling Chapter

Part I Darjeeling Chapter (p 785)—Conspiracy Charge (pp 785-786)—Defendants’ Main Ground of Attack on Judgment (p 786)—Function of Court of Appeal (pp 786-787)—Considered Opinion on the Judgment (pp 787-788)—Importance of Darjeeling Chapter (pp 788-789)—Issue Narrowed Down to “Death” at Dusk or Midnight (p 789)

Nature of Illness

Nature of Illness (p 790)—Dr Calvert’s Evidence and Affidavit of Death (pp 790-791)—Calvert’s Letter of Condolence Some Curious Features (p 791)—“Fourteen Days’ Illness” in Calvert’s Affidavit of Death (pp 791-792)—Untrue Evidence of Dr Ashutosh Das Gupta (pp 792-793)—Other Inaccuracies in Calvert’s Affidavit (p 793)—Defence Theory of Biliary Colic as Cause of Death Examined (pp 793-794)—Symptoms of Arsenical Poisoning (p 794)—No Support for Plaintiff’s Case of Conspiracy to Poison (pp 794-795)—Right Conclusion of Trial Judge as to Cause of Illness (pp 795-796)

Time of “Death”

Time of “Death” (p 796)—Dr Calvert’s Statements (pp 796-797)—Calvert’s Letter to Lindsay (p 797)—Facts in support of Death at Dusk (pp 798-799)—All about the “Telegram of Death” (pp 799-801)—Evidence of “Maitra Group” (pp 801-802)—Judge’s Findings not shown to be “Clearly Wrong” (p 802)—Hour of Death the crucial Test (p 803)

Evening Cremation

Padmini Mohan Neogy’s Evidence (pp 803-804)—Other Witnesses of Evening Cremation (pp 804-805)—Statement of Fakir Roy—a Defence Witness (pp 805-806)—Defence Attack on Story of Evening Cremation (p 806)

Rain or No Rain

Question of Rain or no Rain (pp 806-807)—Rain Reports (p 807)—Records not Sufficiently Definite or Unequivocal (pp 807-808)—No Shed at Cremation Ground (pp 808-809)—Existence of Shelters in the Vicinity (p 809)—Conclusion re-stated (p 809)—Plaintiff's Case how far affected by admitted Morning Cremation (pp 809-810)—Defendants' Arguments (p 810)—Considerations on the Other Side (pp 810-811)

Problem before the Court (p 811)—Case of a Substituted Body (pp 811-812)

Morning Cremation

Defence Story of Morning Cremation (p 812)—Defence Evidence in Brief (pp 812-813)—Plaintiff's Witnesses (pp 813-814)—Swami Onkarananda (p 814)—Ram Sing Subha (pp 814-815)—Defence Evidence again (p 815)—Kasiswari Devi's Presence at "Step Aside" (pp 815-816)—Evidence of Dr Pran Krishna Acharyya (p 816)—Dead Body Lying Downstairs (p 817)

Story of Rescue

Story of Rescue (p 817)—Identity granted—a Clear and Consistent Story (pp 817-818)—Darsan Das's Account (p 818)—"Reads like a Fairy-tale" (p 818)—A Striking Feature about the Story (pp 818-819)—Corroboration of Darsan Das (pp 819-820)—Location of Blanket Factory (p 820)

General Criticisms of Judgment Considered (pp 820-821)—Conclusions on Darjeeling Chapter (p 821)

From May, 1909 to December, 1920

Period May, 1909 to December, 1920 (p 822)

(1) Life of the Plaintiff (pp 822-823)—Criticisms of Plaintiff's Story (p 823)—Phani's Diary or "Lesson-Book"—A False "Measuring-stick" (pp 823-824)—No Spurious Knowledge or Antecedent Cramping (p 824)

(2) Events at Jaidehpur (p 824)—Rumours (pp 824-825)—Defence Theory of "Utter Dissimilarity" (p 825)—Definite Case of a Sudden Conspiracy (p 826)—"Incomprehensible" and "Improbable" (p 826)

II. Identity Chapter

Part II Identity Chapter (p 827)—Photographs (p 827)—Right View taken by Trial Judge (p 827)—Direct Evidence of Identity Tenant Witnesses (pp 827-828)—Defence Insistence on Total Dissimilarity (pp 828-829)—Defendants' Dilemma (p 829)—Issue correctly stated by Trial Judge (p 829)—Sound Appraisal of Evidence (pp 829-830)

Incredible Suggestion of Conspiracy by Jyotirmoyee Devi (p 830)—Honesty of her Evidence (p 830)—Reaction to an Unprecedented Situation (pp 830-831)

Evidence of Sarajubala Devi (p 831)—Purasundari Devi (p 831)—Sarojini Devi (p 832)—Evidence of other Relations (p 832)—Remarkable Feature of the Case (pp 832-833)—Another Important Witness N K Nag (p 833)—Defence Criticism of his Evidence (pp 833-834)

Defence Evidence to disprove Identity (p 834)—Striking Paucity of Independent Witnesses (p 834)—Repudiation by Bibhabati Devi (pp 834-835)—Its True Significance (p 835)—Not Necessarily Dishonest (p 835)

Correct Appreciation of Whole Evidence by Trial Judge (pp 835-836)—Judge's View on Direct Evidence of Identity Unassailable (p 836)

Physical Identity

Comparison of Bodily Features (p 836)—Initial Difficulty (p 837)—Exaggerated Case made by Defence Counsel (pp 837-838)—Some admitted Common Peculiarities (p 838)—Other Features (pp 838-839)—Colour of the Eyes (p 839)—"Kata" eyes of the Kumar Meaning of "Kata" (pp 839-840)—View of Trial Judge Reliance on Documentary Evidence (p 840)—Description in Insurance

Medical Report (p 840)—Defendants' Failure to call for the Report (pp 840-841)—Evidence of Insurance Agent (p 841)—Defence Explanation (pp 841-842)—Affidavit of Kali Prasanna Vidyasagar (p 842)

Features from Photographs (p 842)—Shape of the Nose (pp 842-843)—Presence of a Bony Growth or Node (p 843)

Case about the Marks (p 843)—Irregular Scar over Left Ankle (pp 843-844)—Defence Denial of such a mark on Kumar (p 844)—Challenge by Plaintiff "Hedging" by Defendants (pp 844-845)—Subsequent Production of Insurance Doctor's Report (p 845)—No Explanation of Scar mentioned in Report (pp 845-846)—"Scaly-feet"—A Bhowal Family Peculiarity (p 846)—More than a mere Coincidence (p 846)

Syphilis (p 847)—Medical Examination of Plaintiff (pp 847-848)—Value of Dr K K Chatterjee's opinion as a Specialist (p 848)—Reasonable Conclusion on Medical Evidence as a whole (p 848)—Other Marks (p 849)

Conclusion on Physical Identity (p 849)

Mental Identity

Mind of the Plaintiff (p 850)—Defendants' Exaggerated Picture of the Kumar (p 850)—"Pham's Diary" (pp 850-851)—Trial Judge's Correct Estimate (p 851)—No Previous Tutoring of Plaintiff (pp 851-852)—Mishandling of Case (p 852)—Plaintiff's Cross-examination a Species of "Logomachy" (p 852)—Judge's Conclusion accepted (p 852)

Literacy Spurious Letters put forward by Defendants (p 853)—Bengali and English Signatures of Plaintiff (p 853)—Plaintiff's Evidence of Literacy (pp 853-854)

Handwriting (p 854)—Expert Opinion sought by Defendants before Trial (pp 854-855)—A disingenuous attempt (p 855)—Later Approach to same expert by both sides (pp 855-856)—Calling of Expert as Witness by Plaintiff (p 856)

Judge's Finding accepted (pp 856-857)—Logical Working of Judge's Mind (p 857)

Punjab Enquiry

Plaintiff's Identity—a Punjabee or a Bengalee? (p 857)—Story of the Punjab Enquiry (pp 857-858)—Report of Surendra Chakravarty (p 858)—Telegram to Bibhabati Devi (pp 858-859)—Statements of Punjab Witnesses (p 859)—Commission Evidence at Lahore (p 859)

Bogus Dharam Das put into the Box by Defendants (p 860)—Contradictory Defence Evidence (p 860)—Story of Procuring of Dharam Das the Defence Witness (pp 860-861)—Momtazuddin's Pretended Search for the Witness (p 861)—Identification of Wrong Photograph (pp 861-862)—False Denial by Witness (p 862)—Judge's Conclusion Deliberate Substitution of Photograph (p 862)—Witness Dharam Das not the Plaintiff's Guru (p 863)

Plaintiff's Ability to speak Bengali (pp 863-864)—Plaintiff found to be a Bengalee (p 864)

Summing up

Final Summing up on Whole Case (pp 864-865)

Plaintiff's Delay in Institution of Suit (pp 865-867)

Limitation (pp 867-868)

FINAL DECISION OF SPECIAL BENCH

Final Decision of Court (p 869)—A Misapprehension Corrected (pp 869-870)

Applicability of Full Bench Ruling (pp 870-871)

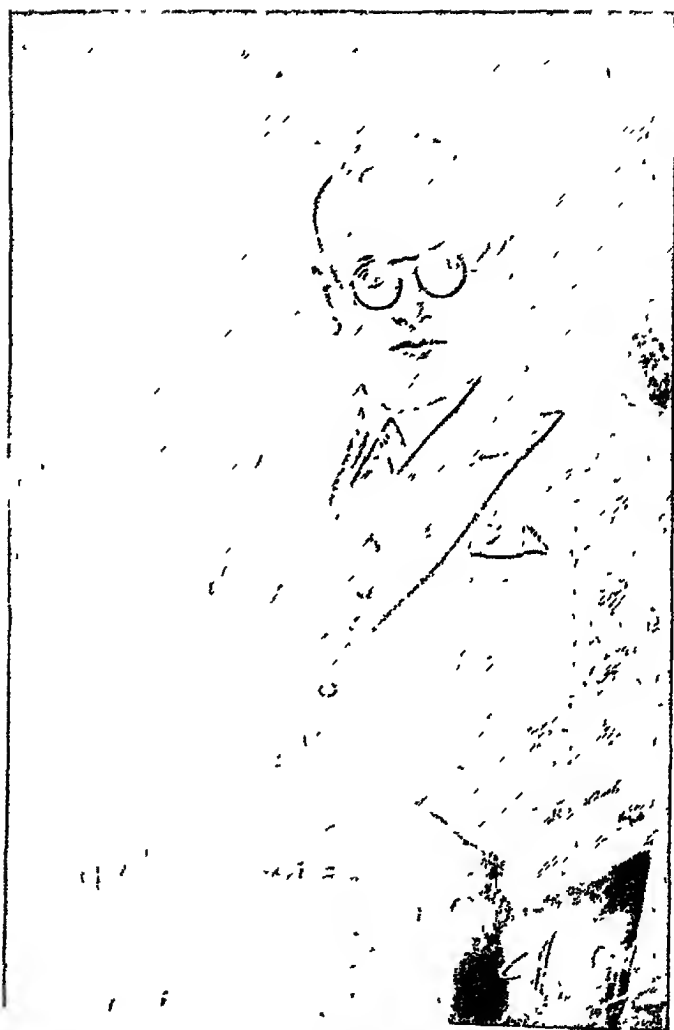
Effect of Costello, J's Absence (pp 871-872)

ILLUSTRATIONS

Second Kumar in frock coat	<i>frontispiece</i>	
The Hon'ble Mr Justice Biswas	<i>facing page</i>	1
The Hon'ble Mr Justice Lodge		435
The Hon'ble Mr Justice Costello		725
Trial judge, Mr Pannalal Basu		753
Plaintiff in lion-cloth	}	869
Second Kumar (Plaintiff)		

ERRATA

Page 139, 4th line from top	for "Mukunda", read "Dr Ashutosh Das Gupta"
Page 193, 17th line from top	for "Nath", read "Chandra"
Page 259, 17th line from top	for "Chatterjee", read "Chaudhuri"
Page 421, 8th line from bottom	for "version", read "vision"



MR JUSTICI BISWAS

Present :

The Hon'ble Mr. Justice Costello,*

The Hon'ble Mr. Justice Biswas,

The Hon'ble Mr. Justice Lodge.

APPEAL FROM ORIGINAL DECREE NO 1 OF 1937

SREEMATI BIBHABATI DEVI and others
(Defendants Nos 1, 3 and 4)

Appellants

Vs

RAMENDRA NARAYAN ROY and another
(Plaintiff and Defendant No. 2)

Respondents.

HEARD —1938—November 14—18, 21—22, 28—30;

December 1—2, 5—9, 12—16, 19—22,

1939—January 3—6, 9—13, 16—20, 23—24, 27, 30—31,

February 3, 6—10, 13—17, 20—22, 27,

March 3, 6—10, 13—17, 20—24, 27—31,

April 3—6, 18—21, 24—28,

May 1—2, 4—5, 8—11, 16—19, 22—24, 26, 29—30,

June 1—2, 5—7, 9, 12—16, 19—23, 26—30,

July 3—7, 10—14, 17—21, 24—28, 31,

August 1—4, 7—11, 14

JUDGMENT—1940—August 20 to 24, 27 to 29,

November 22, 25

* Absent during delivery of judgment

PREFATORY REMARKS

BISWAS, J —Before proceeding to deliver judgment in this appeal, I deem it my duty to state that the senior member of the Bench which had heard the appeal, the Hon'ble Mr Justice Costello, is now on leave in England, and unable, therefore to be present in court to pronounce judgment personally. He has, however, sent in a written opinion from England, which I propose to read in open court in due course. A Rule has recently been framed by this court under the rule-making power conferred by section 122 of the Code of Civil Procedure, which authorises any judge of the High Court to pronounce the written judgment or opinion of any other judge signed by him when such judge continues to be a judge of the court, but is prevented by absence or any other reason from pronouncing that judgment or opinion in open court.

I ought to add that neither my learned brother Lodge J nor I have so far seen the judgment of our learned colleague, and we are not, therefore, aware of the decision he has recorded. I now proceed to read the judgment I have prepared.

BISWAS J'S JUDGMENT BEGINS

This is an appeal against the judgment of Mr Panna Lal Bose, First Additional District Judge, Dacca, which he delivered on the 24th August, 1936, decreeing the plaintiff's suit with costs, after a hearing extending over a period of two years and nine months.

The question raised in the suit was a comparatively simple one, whether the plaintiff was the person he claimed to be, but it involved consideration of a vast and variegated mass of facts on almost every one of which the evidence was sharply divided. Fortunately, the task of the appellate court has been considerably lightened by the very helpful judgment of the trial court which, in my opinion is remarkable as much for its clarity and precision as for its full and fair treatment of the evidence.

So completely and so determinedly were the parties at variance with each other on almost every point, trivial or important, that it is somewhat difficult to present a narrative of facts which may be regarded as admitted or undisputed. It is necessary, however, to attempt in broad outline a general sketch of the story as told on one side or the other in order to appreciate the evidence in the case, or the contentions which were put forward either in the court of first instance or in the appellate court.

PLAINTIFF'S CASE

Stated in the barest form, the plaintiff's case is that he is Ramendra Narayan Roy, the second Kumar of Bhowal, who is supposed to have died at Darjeeling as far back as the 8th of May, 1909, but did not actually die, and who reappeared after an absence of nearly twelve years at a place known as Buckland Bund at Dacca under circumstances which eventually led to

BHOWAL CASE

his being recognised and accepted as the second Kumar by the general public as well as by his relations excepting only a few. Amongst these few who refused to recognise him was his wife Bibhabati Devi who had in fact claimed to succeed to his estate upon his supposed death as his sole surviving widow and heiress under the Hindu Law. This lady, it is said, was completely in the hands of her brother one Rai Bahadur Satyendranath Banerjee,—a name which figures very prominently in these proceedings,—who was admittedly in *de facto* enjoyment of her estate, and judged by ordinary canons of human conduct, would have the strongest motive for denying the plaintiff's identity.

The plaintiff alleges that during his illness at Darjeeling, poison had been administered to him in the course of treatment, and while he lay unconscious as the result thereof, he was taken for dead and his body was carried to the local *sasan* or cremation ground in due course on the night of the 5th May, 1909. At the *sasan*, however, on account of a sudden burst of rain and storm, the members of the cremation party dispersed in all directions for temporary shelter, leaving the body there, and when they returned they found the body missing. Two or three days later when the plaintiff regained consciousness, he found himself amid hills and jungles surrounded by a number of *Naga Sannyasis* (literally, nude ascetics) who tended and nursed him and brought him back to health. He wandered about from place to place with this party of *sannyasis*, until about a year before his return to Dacca he parted company with them at a place called Brahma Chhatra in Nepal and wended his way from there back to Dacca through various places.

At the time of his supposed death the second Kumar of Bhowal was one-third proprietor of an extensive estate spreading over several districts in East Bengal, which has been described as the Bhowal Raj, being the second of three sons of the late proprietor Raja Rajendra Narayan Roy who had his family seat at Jaidebpur, a village about twenty miles from Dacca, and who died on the 26th April, 1901, having executed a deed of trust and a will before his death. As an effect of these documents, the estate vested upon his death in his widow Rani Bilasmoni Devi in trust for his three sons who were known as the first Kumar or Bara Kumar, the second Kumar or Mejo Kumar and the third Kumar or Chhota Kumar respectively. The names of the first and the third Kumars were Ranendra Narayan Roy and Rabindra Narayan Roy respectively. Raja Rajendra Narayan Roy also left him surviving three daughters, Indumoyee, Jyotirmoyee and Tammoyee, the first two having been born before and the last after the birth of the three sons, besides leaving his aged mother Rani Satyabhama Devi, widow of the late Raja Kahi Narayan Roy.

The plaintiff appeared in Buckland Bund towards the end of December, 1920, or the beginning of January, 1921. Not until a few months later, however, was he openly recognised as the second Kumar of Bhowal, or was a claim put forward on his behalf to recover his share of the estate.

The plaintiff states that after he was recognised, the tenants began to pay him rents. On the 3rd June, 1921, however, the Collector of the district, J. H. Lindsay, I.C.S., published a notice declaring him to be an impostor and warning the tenants not to pay any rents to him.

On the 8th December, 1926, the plaintiff submitted a memorial to the Board of Revenue asking for the withdrawal of this notice, but this memorial was rejected by the Board on the 30th March, 1927. The plaintiff was also prevented by the local officers from going to Jaidebpur on the ground of likelihood of a breach of the public peace.

PARTIES TO THE SUIT

The present suit was instituted by the plaintiff on the 24th April, 1930 in the court of the subordinate judge of Dacca. The eldest Kumar Ramendra Narayan Roy had died without leaving any male issue in the year 1910 and was succeeded by his widow Sarajubala Devi, known as Bara Ram or eldest Ram. The youngest Kumar Rabindra Narayan Roy died in 1913, and as he also left no son, his estate devolved on his death on his widow Ananda Kumari Devi, who was called Chhota Ram or youngest Ram. In the year 1919 this lady took a son in adoption named Ram Narayan Roy, but by virtue of an ante-adoption agreement, she still retained an interest in a portion of her husband's estate. The plaintiff has joined all these persons as defendants in this suit, besides the Mejo Ram or second Ram Bibhabati Devi, who is defendant No. 1.

At the date of the suit all the three shares of the estate were under the management of the Court of Wards. The defendants have been consequently represented in these proceedings by the Manager of the Court of Wards.

The widow of the eldest Kumar, Sarajubala Devi, who has been made the second defendant, has supported the plaintiff and has not filed any written statement in the suit. The suit has been contested mainly by the first defendant Bibhabati Devi. A joint written statement was filed on behalf of this defendant and of the adopted son Ram Narayan Roy, defendant No. 3, by the Manager of the Court of Wards. Ananda Kumari Devi, widow of the youngest Kumar and the fourth defendant in the suit, filed a separate written statement on her own account.

The present appeal to this court has been filed by Bibhabati Devi, Ram Narayan Roy and Ananda Kumari Devi, all Wards of Court, represented by the Manager of the Court of Wards, the first defendant Bibhabati Devi also appealing in her individual capacity, and the respondents are the plaintiff and the defendant Sarajubala Devi.

DEFENCE CASE

The common defence of all the defendants other than Sarajubala Devi was a categorical denial of the plaintiff's claim. Their case was, first, that Kumar Ramendra Narayan Roy had in fact died at Darjeeling on the 8th May, 1909, and his body had been burnt to ashes, and secondly, as an inevitable corollary of this, that the plaintiff was an impostor.

QUESTIONS AT ISSUE

It seems to be obvious that from the plaintiff's point of view the main, if not the only, question he is called upon to establish is his identity with Ramendra Narayan Roy, the second Kumar of Bhowal, while the defendants on their part will have completely made out their case if they can prove the death or cremation of the second Kumar at Darjeeling. As will be seen later, the events at Darjeeling indeed fill a very large chapter in the story, and from the defendants' point of view, it is not only a very important chapter but one of crucial significance. Either side has naturally laid stress on its own part of the case, the plaintiff on what for the sake of brevity may be referred to as the question of identity, and the defendants on the question of death and cremation. This difference in the attitude of the parties was reflected in two different issues which were raised in the suit—one, as to whether the plaintiff was the second Kumar Ramendra Narayan Roy of

Bhowal (*Issue No 5*), and the other, as to whether the second Kumar Ramendra Narayan Roy was still alive (*Issue No 4*) The learned trial judge says that he allowed the last issue to stand in deference to the suggestion of the contesting defendants. If this issue is decided in favour of the defendants, that would of course mean an end of the plaintiff's case. On the other hand, it is equally certain that if the other issue is found in favour of the plaintiff, that should likewise be a complete answer to the defendants' case. If it be true that the second Kumar is dead, the plaintiff (or for the matter of that, any other living person) cannot be he, and conversely, if it be found that the plaintiff is the second Kumar of Bhowal, the Kumar cannot have been dead. To put the matter in another way, it follows almost with logical certainty that whichever side proves the affirmative of its case will thereby completely demolish the case of the opposite party. There is, however, this difference between the position of the plaintiff and that of the defendants: the defendants may on their part fail to prove death or cremation but may still win on the failure of the plaintiff to prove identity, but the plaintiff cannot succeed unless he proves identity, even if the defendants fail to prove death or cremation.

That this is the correct position does not to my mind admit of any dispute, and was fully appreciated by the learned judge in the court below (*See his observations at the bottom of page 7 and top of page 8 of Vol 18*) *

After setting out the two issues as follows —

(*Issue No 4*) "Is the second Kumar Ramendra Narayan Roy alive?"

(*Issue No 5*) "Is the present plaintiff the second Kumar Ramendra Narayan Roy of Bhowal?"

the learned judge states—

"I allowed the issue No 4 to stand in deference to the suggestion of the contesting defendants that it may stand. The idea underlying the two issues is that the plaintiff must prove that the second Kumar is alive and that he is the second Kumar. If he can prove that he is the second Kumar, he is alive. If he cannot prove that he is the second Kumar, there will be an end of the case, whether the second Kumar be dead or alive, but death will be an answer to the claim. The plaintiff's case goes so near death and the transactions following the disputed death had, until 1921, been so consistently on the footing that the death was a fact that the onus of proving that the Kumar had not died would, practically speaking, be upon him, but supposing he proves that he is the same man, death is displaced." (*Vol 18, p 7, l 21—p 8, l 6*)

IDENTITY—THE MAIN QUESTION

Quite properly, I think, the learned judge stated that the question therefore was, whether the plaintiff was the second Kumar of Bhowal (*ibid*, p 8, ll 10), and he addressed himself to a consideration of the issue of identity as the primary issue in the suit.

As to whether his ultimate conclusion on the issue of identity is correct or not will have to be fully examined, but it is not to be supposed that because he decided this issue definitely in favour of the plaintiff, he declined

* I may explain that I have throughout referred to the 18 volumes comprising Part I of the Paper Book (containing the order-sheet, pleadings, petitions, depositions and judgment) by Arabic numerals, and to the 3 exhibit volumes in Part II by Roman numerals.

to go into the question of the alleged death and cremation of the second Kumar at Darjeeling. On the other hand, as will appear later, he has devoted a considerable part of his judgment to a full examination of this part of the case. As I shall endeavour to show, it is a complete misreading of this part of the judgment to say, as the appellants attempted to say, that in dealing with what may not inappropriately be called the Darjeeling chapter, the learned judge allowed himself to be swayed by the opinion he had already formed on the question of identity. The passages on which learned counsel for the appellants relied in support of this line of criticism show no more than this that the learned judge was merely attempting to relate the happenings at Darjeeling to the substantive case on the issue of identity. As already pointed out, the plaintiff's claim was based on identity, and to this the defendants' answer—and it would be a conclusive answer, if established,—was that the Kumar did die and his body was actually cremated at Darjeeling. In other words, death or/and cremation was relied upon by the defendants as completely destructive of the plaintiff's case. Obviously, therefore, it would be right for the court to consider and say how far the evidence regarding death and cremation and other relevant facts connected therewith alleged by the defendants was sufficient to repel the conclusion as to identity. I do not understand the learned judge as having said anywhere that he must reject the defendants' evidence regarding any of the Darjeeling events as untrue, merely because he had already come to a finding in the plaintiff's favour on the question of identity. On the other hand, as it strikes me, the learned judge subjected the Darjeeling evidence to an independent examination as if identity had not been established, and all that he did in stating his conclusion was to apply the test, whether or not that evidence was cogent or strong enough to displace identity, which is the same thing as to say, whether or not that evidence established the fact of death or cremation which would destroy identity. According to the learned trial judge, the defendants' evidence failed to satisfy such test. In other words, even if it be supposed that the learned judge's finding on the Darjeeling chapter did not amount to a positive acceptance of the story put forward by the plaintiff in this behalf, it cannot be denied on a fair reading of the judgment that he intended to hold and held that the defendants had wholly failed to prove their case that the second Kumar had actually died or that his body had been burnt to ashes.

DARJEELING CHAPTER—RESPECTIVE CASES

It may perhaps be helpful to state here in very brief outline the respective cases of the parties regarding what took place at Darjeeling.

It is an admitted fact that all the three Kumars were in the habit of paying periodical visits to Calcutta almost every year. The last time that the second Kumar returned to Jaidebpur from Calcutta was on or about the 7th February, 1909. The Kumar was then a young man of 25, and he set out for Darjeeling on the 18th April following, with a large retinue of officers and servants whose names will be found in the judgment at *pages 46 and 47 of Vol. 18*. It will be seen that the party which accompanied him included among others the Kumar's wife Bibhabati Devi, then a young girl of about 19, and his wife's brother Satyendranath Banerjee, who was about 24 years of age at the time. It further included the family physician Dr Ashutosh Das Gupta, also a young man of about the same age, one Mukunda Gnan, Secretary of the Kumar, one C. J. Cabral, an old servant, one Anthony Morel, an Indian Christian who had been in the service of the estate for about five years, and a young man Birendra Chandra Banerjee said to be a relation of the Kumar. The party put up at a house called "Step Aside",

which had admittedly been engaged a few days previously by Satyendranath Banerjee and Mukunda Guin who had expressly come up to Darjeeling for the purpose. A description and a rough plan showing the position of rooms in this house will be found at *pages 311 and 312 of Volume 18*, where the learned judge also gives a helpful sketch, though not drawn to scale, showing the topography of Darjeeling and broadly indicating the relative positions of many of the places referred to in the evidence. Here at Darjeeling, according to the plaintiff, he took ill on the night of the 5th May, 1909 or in the early hours of the 6th, and is supposed to have died on the 8th May following, which was a Saturday, at about dusk. His body, as already stated, was thereafter carried from "Step Aside" to the local burning ground or "*sasan*", a distance of about two or two and a half miles by tortuous hill tracks and about one hour's walk from "Step Aside" going downhill all the way. In going to the *sasan* from "Step Aside", there are two alternative routes up to a certain point one has been referred to in these proceedings as the Commercial Row route and the other as the Thorn Road route, but beyond the said point the route was the same. According to the plaintiff, the cremation party which left the house at about 9 P.M. the same evening followed the Commercial Row route. When the body reached the *sasan* it is said, a storm came on attended by heavy rain which was so violent that all the persons who had accompanied the body ran away from the place and took shelter in certain sheds near about, leaving the body where it was. The rain had apparently sufficient effect on the man who was supposed to be lying dead to make him utter certain sounds which were heard by a number of sannyasis who happened to be waiting in a sort of a cave in the hill-side near by. The sannyasis came up to the spot where the body lay, and observing signs of life in it, took it away. When after about an hour or so the cremation party returned, they found the body gone. It is the plaintiff's case that he had passed into a state of apparent death following the administration of poison, and that the evidence available all points to his having developed symptoms of arsenical poisoning.

The contesting defendants admit the visit of the second Kumar to Darjeeling and his stay at "Step Aside" as stated above. They also agree that he fell ill early in the morning of the 6th May, but state that he died, not at dusk as alleged by the plaintiff, but at about midnight of the 8th May, 1909. They stoutly deny that he had been the victim of poisoning or that he had developed any symptoms of arsenical or any other kind of poisoning. According to them the Kumar died of biliary colic. They deny that there was any funeral procession in the evening as alleged by the plaintiff, and assert on the contrary that the body was taken out for cremation the following morning and cremated with usual rites and ceremonies in the presence of a large body of persons. They say that the cremation took place not at the old *sasan* from which according to the plaintiff's story the body had disappeared the previous night, but at a new burning ground, about a furlong further down, which had recently come into existence and was provided with a shed or shelter. According to the defendants, the route followed by the funeral procession from "Step Aside" was along Thorn Road.

MORNING CREMATION ADMITTED

The plaintiff admits, though there is no mention of this fact in the plaint, that a cremation procession did leave "Step Aside" on the morning of the 9th May, and that a body, obviously purporting to be that of the Kumar, was carried in this procession for cremation and actually cremated. Taking it along with the substantive story of an evening procession following on the

supposed death of the Kumar early in the evening of the 8th May, this admission on the part of the plaintiff carries with it the implication that the body which was taken out on the morning of the 9th May was in fact *not* that of the Kumar. This involves saying that after the evening cremation failed under the circumstances alleged by the plaintiff, another body must have been procured in the course of the night, and that a faked procession was staged with this substituted body on purpose the next morning. In the memorial which the plaintiff presented to the Board of Revenue on the 8th December, 1926 (*Ex J*, Vol III, p 92, paragraph 4), the plaintiff had in fact made the following statement —

“That your humble memorialist is now in possession of conclusive proof that those who alleged his death, being afraid of a public scandal, burnt to ashes a dead body of a substituted person the next morning with full show of a ceremony.”

At the trial the plaintiff was unable to give any positive evidence to show that the body taken out in the morning was not actually that of the Kumar, but merely referred to a number of suspicious circumstances attending the morning cremation from which an inference was sought to be drawn to that effect.

IMPROBABILITY OF SUBSTITUTED DEAD BODY

In support of their own case and in rebuttal of the case made by the plaintiff, the defendants have naturally placed considerable emphasis on the improbability, or as they put it, the utter “impossibility” of another dead body being procured in the course of the night, particularly by very young people who were strangers at Darjeeling, and of such a dead body being brought to “Step Aside” and successfully passed off as that of the Kumar without rousing the suspicions of the second Ram or of the trusted officers and servants of the estate who were at the house. They point out that no allegations have been made by the plaintiff against the second Ram as being in any conspiracy.

There can be no doubt that the procuring and substitution of another body is necessarily implied in the plaintiff's case, and it should certainly be a very important point to consider how far the plaintiff's failure to substantiate such a fact by positive evidence would affect his case generally, if not, in particular, the substantive evidence he has given to prove death at dusk or an evening procession.

HOW FAR IT AFFECTS PLAINTIFF'S CASE

It is enough to state at this stage that if on the evidence it is possible to hold that a funeral procession did leave “Step Aside” on the evening of the 8th May, 1909, and if at the same time it be also a fact that a similar procession started from the same place the next morning, as is the defendants' case and as the plaintiff admits, it must inevitably follow that the body taken out in the morning could not be the same as that which had been taken out the previous evening, unless it be supposed that the body after it had gone out of the house in the evening was brought back to “Step Aside” in the course of the night, which, however, is the case of neither party. In other words, the plaintiff's case of a substituted dead body need not fail merely because of his failure to prove this particular fact by positive evidence; it may equally follow as the only possible conclusion from the other facts indicated, which it will undoubtedly be for the plaintiff to establish to the satisfaction of the court. The first of such facts, as stated above, is the

evening procession, following on supposed death at dusk,—a story which itself carries no inherent improbability with it the question is, whether the story is rendered improbable, or the evidence given in support of it, is rendered unacceptable, merely because, coupled with the fact of a second procession in the morning, it involves the implication of a substituted dead body

DEATH AT DUSK

It is obvious that the plaintiff cannot possibly succeed, if he cannot prove the evening procession, for, if this goes, the procession which went out on the morning of the 9th May would be the only cremation procession, and it is admitted that the body which was taken out in this procession was reduced to ashes. Now, the evening procession cannot be a fact, unless the supposed death of the second Kumar had taken place earlier, that is to say, at about dusk on the 8th May. The precise hour at which this event occurred is not very material it would be enough to show that it happened in the early hours of the evening. Quite rightly, therefore, the learned judge held "death at dusk" to be a pivotal fact in the plaintiff's case (*Vol 18, p 353, ll 19-21*). As has been already pointed out, the defendants' definite allegation is that death took place at about midnight, and if on the evidence this is found to be a fact, it will inevitably wipe out the whole of the plaintiff's case. Not that, theoretically speaking, an attempted cremation of the second Kumar in the morning could not be attended with a similar sequel to that which is said to have followed the evening attempt alleged by the plaintiff, or could not have resulted in the Kumar's escape from cremation or in his rescue, but it is the plaintiff's positive case that all these happenings took place in the dark hours of the night and were in fact a direct consequence of a heavy burst of rain and storm upon the arrival of the cremation party at the *sasan*. The suggestion of the defendants is that the story of death at dusk and evening cremation was a deliberate invention on the part of the plaintiff or of his advisers to avoid the obvious improbability which would be involved in a story of such strange happenings as are said to have occurred at the cremation ground taking place in the broad light of day. The plaintiff, they say, would rather face the greater improbability of a substituted dead body than take such a patent risk.

It is quite natural that the appellants should comment very strongly on the fact that the plaintiff, though he admits that a body was taken to the cremation ground on the morning of the 9th May and cremated as the body of the second Kumar, has not produced a single witness on his side who says that the body was *not* that of the Kumar. But, apart from the fact that this may be taken as only showing that the plaintiff was not prepared to call evidence to prove what he knew he was not in a position to prove, the question still remains whether the plaintiff's failure in this respect may be supposed to help in any way to establish the defendants' positive case that this was the body of the second Kumar. The defendants have in fact adduced substantive evidence on the point if that evidence is accepted, it doubtless establishes their case and necessarily destroys that of the plaintiff, but if, on the other hand, that evidence is not found satisfactory or sufficient, can the defendants' case be still held to be proved, merely because there is no direct evidence on the side of the plaintiff to the contrary?

The respective cases of the parties regarding the Darjeeling events are wholly antagonistic to each other, and as is to be expected, the evidence adduced by both sides is mutually contradictory on almost every question of fact in connection therewith.

DEFENDANT'S CRITICISM OF TRIAL COURT'S JUDGMENT

Before proceeding to examine the evidence it will perhaps be useful to consider a little more fully the appellants' general criticism of the *ratio decidendi* of the trial court's judgment. The gravamen of such criticism is that the learned judge entirely failed to adopt the correct and logical method of approach to the real question which he was called upon to decide. The crucial question in the case, according to learned counsel for appellants Mr A N Chaudhuri, was as to whether the second Kumar of Bhowal had in fact died and his body had been cremated, and it was said that if a conclusion in the affirmative thereon was found impossible, or if a definite conclusion in the negative was reached, then only would the question of identity arise. The learned judge, it was argued, had reversed this natural order. He took up the question of identity first, and having held identity to have been established, he did not really trouble to come to independent findings on the questions relating to death and cremation. His findings, such as they were on these points, were attacked as being based really on an assumption of identity and not on the relevant evidence, which, it was pointed out, was not even fully set forth, much less examined and appraised. The judgment on the Darjeeling chapter, it was accordingly contended, was not a proper judgment at all and the so-called findings therein recorded were of no value whatever.

IDENTITY—A FACT CAPABLE OF LEGAL PROOF

Apart from the fact that the learned judge did not, as I hold, subordinate his findings regarding death and cremation to his decision on the question of identity, Mr Chaudhuri's criticism, to my mind, betrays a lack of appreciation of the correct position. Such criticism might perhaps possess the merit of plausibility, if it could be contended with any show of reason that identity was a matter which was not susceptible of proof in a court of law. But that is a proposition which even Mr Chaudhuri was not prepared to advance. Identity may be sometimes a very difficult matter to decide, but to say that identity is a fact which is not capable of legal proof would be to go in the teeth of numerous cases of mistaken identity with which the Law Reports abound. To mention only one notable instance, reference may be made to the well-known Tichborne case relied on by both sides in the course of their arguments, in which a definite verdict was actually reached as to the identity of the claimant with one Arthur Orton. It is worth while pointing out that in the present case itself the defendants definitely alleged and attempted to prove the plaintiff's identity with a Punjabi peasant named Mal Singh of Aujla, which shows that the defendants themselves do not believe that identity cannot be proved, and yet this would seem to be the only basis on which Mr Chaudhuri could possibly support his contentions. In a case where the identity of an individual is in dispute any party concerned to deny the identity may no doubt rightly require that the court should insist on strict proof before finding identity to be established, and one can understand an argument that the evidence falls short of legal proof. On the question of identity, it is not necessary to minimise the difficulties in the present case arising from its peculiar facts and circumstances, but the standard of proof which should satisfy the court is clearly laid down for us in the Indian Evidence Act. It cannot admit of any dispute that the identity which the plaintiff claims in this case with Ramendra Narayan Roy, the second Kumar of Bhowal, is a "fact" within the meaning of the word as

defined in s 3 of the said Act "Fact", according to this definition, means and includes—

"(1) any thing state of things, or relation of things, capable of being perceived by the senses,

"(2) any mental condition of which any person is conscious "

That the plaintiff is the person he claims to be is undoubtedly a "thing" "capable of being perceived by the senses", and there can be no doubt that it is "a fact in issue" in the suit. The question is, what are the conditions which must be satisfied in order that this may be held to be "proved" S 3 of the Indian Evidence Act lays down

"A fact is said to be *proved* when, after considering the matter before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists "

In order, therefore, to make a proper assessment of the findings of the learned trial judge on the question of identity, the test to apply would be to see if there were sufficient materials placed before the court by proper and legal means to have induced it either to believe in the existence of the fact of identity or to consider its existence so probable that a prudent man ought to act upon the supposition that it existed. As has been rightly observed, "the true question in trials of fact is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth, that is, whether the facts are shown by competent and satisfactory evidence." It might be pertinent also to add in this connection that, as the Privy Council laid down in *Ramalinga Pillay v Sadasiva Pillay*, (1864) 9 Moore's I A 506, when there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced.

It follows that if in the present case the identity of the plaintiff could be held as "proved" within the meaning of the Indian Evidence Act, death and cremation of the second Kumar as alleged by the defendants would be automatically disproved, and Mr Chaudhuri had to concede that identity so proved would override the improbabilities of the plaintiff's case regarding Darjeeling. If it is Mr Chaudhuri's contention that the evidence of identity on the plaintiff's side was not sufficient or reliable, the plaintiff would undoubtedly fail on that ground alone, whether the defendants were able or not, on their part, to prove their case of death and cremation. On the assumption of a correct finding by the learned trial judge on the question of identity, Mr Chaudhuri's attack on the Darjeeling chapter of the judgment would thus appear to be wholly without point. If the plaintiff, on his part, is in fact unable to establish identity to the satisfaction of the court, this itself will relieve the defendants of the burden of having to prove death and cremation, and from this point of view, any criticism of the learned judge's findings on death and cremation, however interesting it might be as an exercise in forensic dialectics, would be so much wasted effort.

JUDGE'S ORDER OF TREATMENT JUSTIFIED

Logically speaking, therefore, Mr Chaudhuri's attack on the judgment must be directed against the merits of the finding on the question of identity, and not against the learned judge's mode of approach to the case. From one point of view it may be said that the order which the learned judge followed in taking up the question of identity first and then the question of death and cremation, was really in favour of the defendants rather than of

the plaintiff, for, while it laid on the plaintiff an initial burden, heavy enough in any case of disputed identity, but all the heavier in this case by reason of its extraordinary facts and circumstances, it rendered it all the easier by that very fact for the defendants to demolish the plaintiff's claim. If Mr Chaudhuri is right, it should be more difficult for the plaintiff to prove identity than for the defendants to prove death or cremation. Why, then, should he complain if the heavier burden is thrown on his adversary? It is hardly necessary to repeat that if the plaintiff fails on identity, he fails altogether, even if death or cremation is not proved.

It seems to me, therefore, that the only question that matters is not whether the learned judge has based his findings as regards death and cremation ultimately on identity, but whether his finding on the question of identity itself is sound and proper. As a general proposition it can be safely asserted, to put the matter in a logical form, that identity, if established, would negative death and cremation, just as death and cremation, if established, would negative identity, and it ought not to make any difference in strict theory, which of these questions is taken up first for consideration, so long as the court insists on and applies a correct standard of proof in coming to its findings. The effect of Mr Chaudhuri's own contention is that identity on the one hand and death and cremation on the other are two distinct chapters and ought to be kept apart. His complaint against the learned trial judge in fact is that in dealing with the evidence of death and cremation, the learned judge allowed himself to be influenced by the opinion he had already been led to form on the question of identity. By parity of reason it might be argued, on the other hand, that if the learned judge had reversed the order and taken up the question of death and cremation first, as Mr Chaudhuri says he should have done, it would have been equally obnoxious for him to have allowed his findings on this question to influence his judgment on the issue of identity.

The respondent before us through his learned counsel Mr B C Chatterjee maintained that Mr Chaudhuri had in fact laid far greater stress on the value of identity as the deciding factor in the case than the learned judge had permitted himself to do. The criticism is not without justification, as an examination of the scheme of the judgment will show. Strictly speaking, as already pointed out, it was quite open to the learned judge, once he was satisfied on the question of identity, to make this the touchstone of the case as to death and cremation and to reject the defendants' evidence on this head as necessarily false. But that is far from what the learned judge actually did. On the other hand, with characteristic fairness, he entered into a minute examination of the whole of the case touching death and cremation, subjecting the evidence to a careful and detailed analysis.

At the hearing of the appeal before us, learned counsel on either side preferred to deal with the Darjeeling chapter first, before going into the question of identity, and there can be no objection to following the same order of treatment in the present judgment.

SOME BROAD FACTS

Still there are certain outstanding facts and features connected with the defendants' case generally which may be noticed at the outset.

DEFENCE STORY—PLAINTIFF, A "MEDICINE-MAN"

One important fact to be observed is that though the defendants say that the plaintiff was an impostor, they admit that he was an impostor who came

upon the scene with no ulterior designs of his own to start with. The plaintiff came to Dacca as an ordinary sadhu and took up his position at a place which was the usual haunt of sadhus in that town. Here he acted and behaved throughout as a person who was not only bereft of worldly belongings, but of worldly longings as well. According to the defendants, the plaintiff was in fact a mere "medicine-man" who was distributing "*elachi*" or cardamoms to passers-by and offering recipes for the cure of all sorts of ailments, and it was as a "medicine-man" that he was taken from place to place by credulous persons who believed in his supernatural powers. He was thus first taken to Kasimpur, a place not far away from Jaidebpur, on or about the 5th April, 1921 (23rd Chaitra, 1327 B S) to perform, it is said, for one Sarada Prosad Roy Chaudhuri, a well-known local zemindar, a ceremony called "*puleshti jagna*", which is a well-known religious ceremony amongst Hindus for the purpose of procuring a son. From there he was sent down to Jaidebpur to Rai Sahib Jogendra Nath Banerjee, a Court of Wards officer attached to the Bhowal Raj estate, at the Rajbari, and while he was staying here, he admittedly paid a visit to the house of Jyotirmoyee Devi at Chakkar, a quarter of Jaidebpur not far from the Rajbari, which the defendants say he did for the purpose of curing some eye-trouble of a daughter of the family. There is some dispute between the parties as to the date of this visit to Jaidebpur: the plaintiff says that he arrived here on the 12th April, 1921, or the 30th Chaitra, 1327 B S, whereas the defendants assert, for a purpose which will be seen later, that he came on the following day, which was the *Chait-Sankranti* or the last day of the Bengali month of Chait or Chaitra and in fact the last day of the Bengali year. It is common ground, however, that this *Chait-Sankranti* visit was of short duration and that plaintiff left Jaidebpur on the third day of his arrival.

NOT SUSPECTED AS SECOND KUMAR

It is next to be observed that according to the defendants, while the plaintiff was at Buckland Bund or at Kasimpur, no suspicion crossed the mind of any one who saw him there that he might be the second Kumar of Bhowal. No such suspicion, on the defendants' case, could possibly arise, when death of the second Kumar at Darjeeling in 1909 was an accepted certainty, and an only rumour that he might be still alive, which the defendants admit arose in 1917, is said to have perished almost as soon as it had originated, on receipt by Rani Satyabhama Devi of a reply from the Maharajadhiraj Bahadur of Burdwan to a letter she had written to him on the 3rd September of that year referring to such a rumour (*Ex Z(33), Vol II, p 175*). Moreover, the defendants say that the plaintiff looked so "*utterly dissimilar*" that it was not possible for any one to mistake him for the second Kumar. The defendants, it will be seen, afterwards came to realise the implications of this theory of "*utter dissimilarity*", and tried their best to whittle it down.

JYOTIRMOYEE DEVI—DE FACTO PLAINTIFF

Another important fact which it is necessary to point out is that, according to the defendants, Jyotirmoyee Devi is the *de facto* plaintiff in the case: it is said that it was she who actually manoeuvred the plaintiff into the position which he was ultimately forced to accept. It is definitely *not* the defendants' case that Jyotirmoyee Devi had, by a pre-concerted plan, contrived to get the plaintiff at Buckland Bund and left him there to watch the reaction of the public mind to any insidious propaganda engineered by her in the meantime to the effect that the plaintiff was her long-lost brother. The defendants'

suggestion, on the other hand, is that it was either at the Chait-Sankranti visit or shortly thereafter that this lady, struck by some superficial physical resemblance of the plaintiff with the second Kumar, first conceived the idea of putting him forward. A few days later she tried to arrange another interview with the plaintiff at Dacca at the house of her youngest sister Tarinmoyee Devi, but as Tarinmoyee's husband would not allow it, she finally managed to have the plaintiff taken to the house of one Sarbalam Devi, a second cousin of the Kumars, who stayed at Dacca and is an important witness examined on commission on behalf of the defendants (*Vol 3, pp 436-472*). Finally, on the 30th April, 1921, Jyotirmoyee Devi had the plaintiff brought down for the second time to her own house at Jaidehpur, and it is said that this was done with the definite object of trying, if she could, to get the plaintiff to play the role which she had already made up her mind he should play in her interest. The plaintiff was naturally hesitant at first and his diffidence had to be overcome, and for this purpose, it is asserted, this wily lady staged an elaborate make-believe in the shape of a public demonstration at her house on the 4th May, 1921, at which hundreds of people purported to have openly recognised and acclaimed the plaintiff as the second Kumar of Bhowal. This incident is a landmark in the history of the case and has been referred to in these proceedings as "*Atma Parichaya*" (literally, self-revelation) or *Declaration of Identity* by the plaintiff.

QUESTION OF MOTIVE

Now, supposing the defendants are right in the case they have made as stated above, they are inevitably faced with the question as to why or how Jyotirmoyee Devi should or could all on a sudden have taken it into her head to concoct such a huge scheme of fraud, and then worked it out with such signal success. In the first place, had she any motive? Not that the defendants are called upon to prove the existence of any definite motive, but in judging the probabilities of human conduct, particularly of such strange conduct as the defendants ascribe to this lady,—a *pardanashin* Hindu widow whose past record does not certainly justify even a remote suspicion of anything like a Machiavelian turn of mind,—the consideration of motives cannot be altogether eliminated. Assuming the second Kumar had died, neither he nor any of his brothers had left any male issue, and if there was no adoption by any of the widows, the sisters' sons would be the nearest reversioners. Jyotirmoyee Devi had a son living at the time, named Jalad Mukherjee *alias* Buddha. She would certainly not be advancing the prospects of her son's succession to a share in the estate (it may be, along with other sisters' sons of the Kumars) by bringing back to life, so to say, a deceased brother. In point of fact, the youngest Ram Ananda Kumari Devi had adopted a son, Ram Narayan Roy, in May 1919, a fact which was by itself enough to cut off all chances of succession for Jyotirmoyee Devi's own son or the sons of any other sister. How could Jyotirmoyee Devi in this state of things profit at all by contriving the reappearance of the second Kumar in 1921? This might affect the reversionary interest of the adopted son to the second Kumar's share, but would not certainly secure any benefit to her or to her son. The defendants have not even hinted at the existence of any pact or understanding, secret or otherwise, between the plaintiff and Jyotirmoyee Devi stipulating for division of the estate between themselves as the reward of ultimate success. The adoption of Ram Narayan Roy came to be challenged afterwards by a suit instituted by the son of the youngest sister Tarinmoyee Devi, but this was in 1925, four years after Jyotirmoyee Devi is supposed to have set to work on her fraudulent venture. Was she, then, minded, through malice

or malevolence, to inflict harm on the second Rani by fosting a husband upon her, or to deal an indirect blow at the third Rani by imperilling her adopted son's reversion? The evidence is, and it is not disputed by the defendants, that till the arrival of the plaintiff, Jyotirmoyee Devi was on excellent terms with either Rani. I am not at all surprised that learned counsel for the defendants had no answer to give to the pertinent comments made by the learned judge in this connection at p 59 or at pp 91-92 of the judgment (Vol 18)

According to the defendants' case, it must be taken that Jyotirmoyee Devi's action in "propounding" the plaintiff was a fortuitous consequence of her accidental discovery of the plaintiff. They do not say or suggest that prior to the arrival of the plaintiff at Dacca this lady had been wistfully looking out for a possible "double" of her deceased brother Ramendra Narayan, or that she had any reasons to consider the reappearance of her brother as something within the range of probability. On the other hand, it is the defendants' case, and they have stoutly adhered to this case right to the end, that the death of the second Kumar was an accepted fact, that Jyotirmoyee Devi must have believed and did believe in his death, and that she must have known and did know that this was also the belief of everyone concerned. The defendants in fact scout the plaintiff's story as to any rumours having been afloat anywhere or at any time since the date of supposed death of the second Kumar, to the effect that his body had not been cremated or that he was still alive, except that they admit only one short-lived rumour, that of 1917, to which reference has been already made. If, then, as the defendants maintain, there was not only no background already in existence for the possible acceptance of such a story as Jyotirmoyee Devi is supposed to have started, but the facts were all positively against it, is it likely or probable that Jyotirmoyee Devi, or for the matter of that any person, however shrewd or intriguing, should or could invent such a tale and then run away with it? If, as is their case, the second Kumar had died at Darjeeling and his body had been cremated in due course, and this was known to Jyotirmoyee Devi, she must have realised that before she could think of successfully passing off a fictitious person as her second brother, she would have to overcome this fact of his death and cremation. The records will, however, have to be searched in vain for any evidence on defendants' side that within the short space of a few days that she had for hatching and perfecting her wicked plot, there was any attempt by her or on her behalf to procure materials which might help to demolish this initial obstacle of fact.

It is necessary now to advert briefly to certain other facts before coming to a consideration of the evidence on the Darjeeling part of the case.

"ATMA PARICHAYA"

As has been seen, the "*Atma Parichaya*" or Declaration of Identity by the plaintiff took place at the house of Jyotirmoyee Devi on the 4th May, 1921. A graphic account of the happenings of this day, as also of the three days preceding this event, is given by her (Vol 8, pp 301 *et seq*), and there is practically no cross-examination of this witness on the point. Her story is in fact corroborated in material particulars by other witnesses on behalf of the plaintiff. It is definitely the plaintiff's case that Rai Sahib Jogendra Nath Banerjee who had entered the service of the Bhowal Raj as Private Secretary of the Kumars in Chattr, 1311 BS (that is, about April, 1905), and had known the second Kumar intimately, was not only present at the "*Atma Parichaya*" (*ibid*, p 303, l 2), but had been coming to Jyotirmoyee

Devi's house every day that the plaintiff was there (*ibid*, p 362, l 7) This is denied by the defendants who maintain that neither Rai Sahib Jogendra Nath Banerjee, nor the Assistant Manager of the estate Mohini Mohan Chakravarty or any other witness on their behalf was present at Jyotirmoyee Devi's house at any time before or during the "*Atma Parichaya*" The defendants have not in fact chosen to call a single person who was present on the occasion as a witness to contradict the account given on the plaintiff's side (*Vol 18, p 93 bottom*) All the same, they have thought it fit to challenge the plaintiff's case regarding this event, pointing to certain alleged discrepancies in the evidence of some of the plaintiff's witnesses who seek to corroborate the account given by Jyotirmoyee Devi The matter need not be examined fully at this stage, but it is enough to refer here to certain contemporaneous documents which speak for themselves

NEEDHAM'S REPORT OF 5TH MAY, 1921

Apparently the incident which took place on the 4th May, 1921 produced a tremendous local commotion In point of fact it led to a confidential report being made the following morning by F W Needham, the Chief Manager of the Bhowal Court of Wards Estate, to the Collector of the District, J H Lindsay, ICS A copy of this report was sent by Needham the same day to Sarajubala Devi, widow of the eldest Kumar, at Calcutta, and this has been produced by the plaintiff and marked as an exhibit on his behalf (*Ex 59, Vol II, p 212*) The plaintiff relies on this document strongly as valuable evidence of the matters dealt with therein, which refer not merely to the incident of the 4th May, 1921, but to a wide-spread impression which had been already created in the public mind since the plaintiff's arrival at the house of Jyotirmoyee Devi a week ago that he was the second Kumar The report also mentions the plaintiff's prior visit to the house of Sarada Prosad Roy Chaudhuri at Kasimpur, his subsequent halt at Jaidebpur, and his visit to the house of Jyotirmoyee Devi on this occasion, which has been already referred to as the Chait-Sankranti visit According to the defendants, this report had been drafted for Needham by Rai Sahib Jogendra Nath Banerjee and Mohini Mohan Chakravarty, and was based mainly on information which had been supplied to these two gentlemen by the inmates of Jyotirmoyee Devi's house

FURTHER REPORT BY ASSISTANT MANAGER

On the following day, namely, the 6th May, 1921, there was a further report concerning the sadhu, submitted by the Assistant Manager Mohini Mohan Chakravarty, to the Chief Manager Needham, which is an exhibit on behalf of the defendants (*Ex 2(203), Vol II, p 215*)

DR ASHUTOSH DAS GUPTA'S LETTER OF MAY 5, 1921

There is another interesting contemporaneous document of this period put on record by the plaintiff which may be referred to in this connection (*Ex 398, Vol II, p 214*) It is a post-card dated the 5th May, 1921, in Bengali from Dr Ashutosh Das Gupta, the family physician of the second Kumar, who had accompanied him to Darjeeling in 1909, and who is a very important witness on behalf of the defendants (*D W 365, Vol 16, pp 240-246*), written from Jaidebpur, to Sailendra Nath Motilal, brother of the first Rani, who was then in Calcutta The writer states that a very wonderful incident had happened at Bhowal, the like of which was not to be found even in

fiction. A sadhu had arrived here at the house of Buddhu Babu (son of Jyotirmoyee Devi), and had given out that he was the second Kumar Ramendra Narayan Roy. Five or six thousand people were coming to see him every day and some of them were paying him *nazar* (present). Every one was firmly convinced that he was the Kumar himself. The affair had caused a great stir. The writer adds, "As I came and said that it was false, a hundred thousand people of Bhowal have been blaming me", and concludes that he was passing his days in terrible suspense.

It may be stated in passing that there is some dispute between the parties as to the precise meaning of the words within inverted commas above whether they refer to Dr. Das Gupta having falsely denied the identity of the plaintiff as the second Kumar, or to a false report which he is supposed to have made after he had come from Darjeeling (that is, in 1909). On the latter interpretation, which the defendants were inclined to adopt in this court, Dr. Das Gupta must have made a report concerning the death of the Kumar which now turned out to be false on his reappearance in the person of the sadhu.

Be that as it may, there is one important point to observe about this letter (*Ex 398*) as well as about Needham's report of the 5th May (*Ex 59*) and the report of Mohini Mohan Chakravarty of the 6th May, 1921 (*Ex Z(203)*), namely, that in none of these documents is there any mention of any story having been given out by or on behalf of the sadhu at or about this time, as to the circumstances in which the second Kumar is supposed to have survived an attempted cremation at Darjeeling in the year 1909. In Mohini Mohan Chakravarty's report it is stated, on the other hand, that the estate officials had tried their best to get from the sadhu definite information regarding "past events in the life of the second Kumar", but were unable to obtain any particulars, as the sadhu declined to answer their questions. The significance of this point will be apparent later on.

PUBLIC RECOGNITION OF PLAINTIFF AS KUMAR

From after the 4th May, 1921, it is not disputed that the plaintiff was attracting large crowds of people who were daily coming to see him at Jyotirmoyee Devi's house, and the plaintiff states that he was also receiving rents and *nazar* from the tenants of the Bhowal estate from this date onwards on the footing that he was the second Kumar. On the 15th May following there was a largely attended meeting at Jaidebpur on a *chalan* or open piece of land in front of the Rajbari at which the plaintiff is said to have been publicly acclaimed as the second Kumar, and copies of the resolutions passed at this meeting were duly forwarded to the authorities.

ATTITUDE OF COURT OF WARDS

It appears that while the plaintiff was thus daily gaining recognition and support from the tenantry of the estate as well as from the relations and members of the Kumar's family, the local officials of the Court of Wards assumed a definitely hostile attitude towards him, and according to the plaintiff, it may be added, this dated from the 6th May, 1921. The action which they took, the enquiries which they set on foot, and the various proceedings which they held or caused to be held to counter the plaintiff's claim, form an important chapter in the case and will be adverted to presently.

In the meantime, about three weeks after the public meeting of the 15th May, 1921, another meeting was held of the tenants and taluqdars of the

estate at which an Association was formed called "*The Bhowal Taluqdar and Proja Samiti*" at Jaidebpur, with a view to "establish the Kumar in his legal position by legal means and to maintain him", as is deposed to by P W 228, Digendra Narayan Ghose (*Vol 5, p 460, l 40—p 461, l 1*), who was elected President of the Samiti and admittedly came to be one of the strongest supporters of the plaintiff (*See in this connection Ex 21, Vol II, p 275*). The Samiti made arrangements to collect subscriptions, and a sum of Rs 10,000 to Rs 12,000 is said to have been raised up to the month of Kartik 1329 B S (October 1922), when the Samiti ceased to function without being formally dissolved (*Vol 5, pp 460-461*).

PROPAGANDA

The defendants say that this was part of an intensive propaganda which was carried on on behalf of the plaintiff, in course of which a large number of pamphlets in prose or verse were published, which had an extensive circulation and some of which were said to contain scurrilous accusations against Satyendranath Banerjee and Dr Ashutosh Das Gupta, if not against Bibhabati Devi herself. It must not be supposed that there were no counter-pamphlets as well, supporting the defendants and directed against the plaintiff, nor, if we are to believe D W 92, Phanu Bhusan Banerjee (*Vol 14, p 138, ll 14-18*), that there was no "counter-meeting" on behalf of the defendants to meet the propaganda of the Bhowal Taluqdar and Proja Samiti (*see also in this connection Ex Z(225), Vol II, p 352*).

It is necessary to refer particularly to one Bengali pamphlet on the plaintiff's side, styled "*Fakir beshe praner Raja*" ("The sovereign of our heart in the garb of an ascetic"), in which an imputation was made against Dr Ashutosh Das Gupta to the effect that he had poisoned the Kumar at Darjeeling. This gave rise to a criminal proceeding on a charge of defamation under sec 500 of the Indian Penal Code instituted by the doctor against the writer and the printer, Purna Chandra Ghose and Satish Chandra Roy respectively, the former being a son of Digendra Narayan Ghose, President of the Bhowal Taluqdar and Proja Samiti aforesaid. This prosecution, which was started on the 9th September, 1921 and has been referred to in the present proceedings as the "Defamation Case", eventually ended in the conviction of the accused, after it had been dealt with by two Deputy Magistrates,—first by Mr Sarada Prosonno Ghose, and then by Mr Birendra Mohan Ghose who acquitted them on the 31st May 1923, but whose order of acquittal was set aside on an appeal to the High Court by the Local Government (*See the case reported in 28 C W N 579*). The importance of this case lies in the fact that some of the persons who then gave evidence were afterwards witnesses in the present suit, and their present evidence has accordingly to be considered in relation to their previous depositions. Important among such witnesses are Dr Ashutosh Das Gupta (*D W 365, Vol 16, pp 240-246*) and Birendra Chandra Banerjee (*D W 290, Vol 15, pp 314-377*). The learned judge finds, and this finding has not been seriously challenged by either side, that Dr Ashutosh Das Gupta was the nominal complainant in the case, but the prosecution was really conducted by the Government Pleader of Dacca, Rai Bahadur Sasanka Coomarr Ghose, on behalf of the Bhowal Estate, while the accused were assisted by the plaintiff (*Vol 18, p 99, ll 7-13, and p 116, ll 14-17*).

Although many of these pamphlets have been put in evidence on behalf of the plaintiff, learned counsel for the defendants has failed to point to any evidence on the record to establish the plaintiff's connection with them, and

in my opinion, it would be wrong to accept or act on any statements contained in such pamphlets as if they were admissions on the part of the plaintiff, or contained the plaintiff's version on any part of his case. I entirely agree, if I may say so, in the views expressed by the learned judge on the point (*Vol 18, p 113, ll 35-41*)

Reference may now be briefly made to the course of events showing the immediate reactions in the defendants' camp to the plaintiff's declaration of identity, and the account may well begin with Satyendranath Banerjee, brother of Bibhabati Devi and now a Rai Bahadur. He was undoubtedly a person most vitally interested in denying the plaintiff's claim, and according to the plaintiff, did in fact engineer the whole of the opposition to him.

Bibhabati Devi was not at Jaidebpur at this time. She had in fact left Jaidebpur in the year 1909, shortly after her return from Darjeeling, and came to live in Calcutta with her brother Satyendranath Banerjee. In May 1921 she was staying with him at a house at No 19, Lansdowne Road, a property worth over rupees two lakhs, which she admits had been purchased by her brother for himself entirely with her money (*Vol 12, pp 242 and 243 - see also judgment, Vol 18, p 60, ll 15-19*)

According to Satyendranath Banerjee, who is D W 380 (*Vol 16, pp 423-545*), it was in the first week of May, 1921, that he came to hear of the plaintiff's arrival at Jaidebpur. He is not quite sure about the source of his information: it might be either Rai Sahib Jogendranath Banerjee or the Assistant Manager Mohan Mohan Chakravarty or the Chief Manager Needham (*ibid, p 489, ll 29-31*). But it is in evidence that a copy of Needham's report of the 5th May, 1921 (*Ex 59, Vol II, p 212*) had been sent at the time to Bibhabati Devi as well as to each of the other two Ranis.

CONDUCT OF SATYENDRANATH BANERJEE

After receiving this report, what was the first step Satyendra took about it? He does not remember it at this distance of time, but in all probability he and his sister "talked the matter over". His sister was "astomished", but not "upset", and judging from his evidence, he too felt no more than a shock of mild surprise (*Vol 16, p 490, ll 10-17*). Both of them of course knew it for a fact that the second Kumar had died, and it so happened that by an extraordinary stroke of luck and foresight Satyendra was still in possession of documentary evidence of death, though only in copies. The documents were certain certificates of death and cremation of the second Kumar which had to be obtained after his death or supposed death, for the purpose of drawing out money on an insurance policy on the life of the Kumar, and copies of which Satyendra had been carefully preserving ever since.

It is idently Satyendra did not think it necessary or worth while to proceed to Jaidebpur to silence the agitation there, much less to make any enquiries regarding the supposed Kumar who was the centre of such agitation. He does not think he even put himself in communication with Lindsay, Collector of Dacca, except probably to send him copies of the Insurance affidavits (*ibid, p 489, ll 27-28*). What he did was simply to see two officials at the Secretariat in Calcutta—Lees and Lethbridge, the then Member and Secretary of the Board of Revenue respectively, the Board of Revenue being primarily under the statute (*Bengal Act IX of 1879*) the "Court of Wards", and having power to delegate any of its powers in this behalf to a Commissioner or a Collector or to any other person who is thereupon constituted as the Court of Wards in respect of such powers (*see 3*)

In the meantime, on the 7th May, 1921, there appeared in the "Englishman" newspaper of Calcutta a report about the Jaidebpur sadhu sent by the Associated Press from Dacca under the heading "Dacca Sensation". At the advice of Lees, Satyendra says (*Vol 16, p 490, ll 21-24*) he sent a contradiction to this report which was published in the issue of the "Englishman" of the 9th May (*Ex 409, Vol II, p 217*), and it may be pointed out that as the 8th May was a Sunday, it is very likely that Satyendra had seen Lees on the 7th.

In sending this contradiction Satyendra states he was anxious to "convince" the public that the second Kumar had died, and he apparently thought it was quite enough for the purpose to state that the Kumar had been attended in his last illness by Lt-Col Calvert, the then Civil Surgeon of Darjeeling, and that he himself (Satyendra) was "personally present" at the time of his death, without mentioning the further fact that Lt Col Calvert was also then present, though he admits he had this fact in mind at the time he was writing, and it came to be a vital part of his case later on (*Vol 16, p 490, ll 26-29*).

Satyendra is not in a position to contradict that he saw Lethbridge more than once, and might have seen him in fact before his interview with Lees, but he leaves us in no doubt as to the object of his visits. He remembers he went to ask Lethbridge to take steps to "safeguard the evidence of the Kumar's death" (*ibid, p 490, ll 31-33*), and wanted him in fact to see the originals of the insurance papers of which he left copies with him (*ibid, p 445, ll 26-27*). It appears that at his suggestion Lethbridge did write to the Insurance Company on the 10th May, 1921 calling for these papers. Acting on instructions from their Head Office in Glasgow, the Calcutta office of the Company sent to him on the 14th July following their file of papers containing the evidence of the Kumar's death and attached correspondence along with the original medical report on the Kumar's life (*Ex 450, Vol I, p 190*). Lethbridge, however, returned the documents to the Company the next day, as he did not consider it proper for the Court of Wards to take charge of these papers or that they should be handed over to either party to the dispute, but thought that if required in evidence, it would be more proper, if they were produced from the custody of the Company (*see Ex 448, Vol I, p 193*).

It is worth while to point out in passing that though the papers sent by the Insurance Company to the Board of Revenue included the medical report, and the Board of Revenue officials had an opportunity of inspecting the document before it was returned by them, the defendants made no attempt to produce it at the trial, and it was left to the plaintiff to call for it and have it produced by the Company at a late stage, namely, on the 15th December, 1934. The report which had been made in the year 1905 showed a certain identifying mark as having existed on the body of the second Kumar and this tallied with a mark on the plaintiff which a large number of his witnesses had already spoken to long before the document came to be produced, but which the defendants had been strenuously denying all along until after the arrival of the report they could do so no longer (*Vol 18, pp 232-233*).

Satyendra states that on receipt of Needham's report he summoned no lawyer to counsel (*Vol 16, p 490, l 17*), but a lawyer did happen to come to him shortly after from Dacca in the person of the Government Pleader, Rai Bahadur Sasanka Coomar Ghose. The exact date of his arrival, or whether he came because he had been sent down by Lindsay to see Satyendra, is not clear, but it is not disputed that he came with "a letter in his pocket from the Collector" (*ibid, p 489, l 17*), and that he met Satyendra in Calcutta,

if he did not actually put up at his house. This "letter from the Collector" appears to be a report which Landsay had drawn up on the 10th May, 1921, for the Board of Revenue, on the contents of which Landsay was cross-examined on behalf of the plaintiff when he was giving his evidence on commission in London in September, 1931 (*Vol 2, pp 174-176*). For some unaccountable reason this report, though called for by the plaintiff, was never produced by the defendants in the trial court. A copy of it was, however, put in in this court by learned counsel for the defendants at the request of the plaintiff and was allowed to be marked by consent as *Exhibit 476*.

VISIT TO DARJEELING

Satyendra's evidence is that Rai Bahadur Sasanka Coomar Ghose was on his way to Darjeeling, having been asked by Landsay to go there, and that he was going there "with some proposals to the Member of the Board of Revenue and to get his orders" (*Vol 16, p 489, ll 19-20*). The Rai Bahadur actually left on a date before the 15th May, presumably after having obtained in Calcutta on the 13th May the opinion of the Standing Counsel Mr (afterwards Sir) B L Mitter on the legal position of the sadhu (*Ex 2 (357), Vol II, p 218*). Satyendra says that at the suggestion of the Rai Bahadur he accompanied him on this journey to Darjeeling, and he also took along with him a "barrister friend" of his—"out of love and friendship", as he puts it, though it afterwards turned out "quite accidentally" that this barrister friend was a brother-in-law of the particular Deputy Magistrate who, as will be stated presently, happened to be employed to take down statements of witnesses at Darjeeling (*Vol 16, p 491*). His visit to Darjeeling on this occasion, if we are to believe Satyendra, lasted for three or four days, and all that he did there was to see Lees and tell him in the presence of the Rai Bahadur "all that could be said to show that the plaintiff's claim was false and that he was an impostor" (*ibid, p 491, ll 34-36*). It is his statement that Lees and the Rai Bahadur "did not discuss the steps to be taken against the plaintiff".

RECORDING OF STATEMENTS

It still remains a fact that while these two gentlemen with the "barrister friend" were staying at Darjeeling,—and it may be stated that they were all putting up at the same hotel,—there commenced the recording of statements of sundry witnesses by a Deputy Magistrate of the name of N K Roy concerning the alleged death and cremation of the second Kumar. As to what led to this proceeding, or to the selection of a Deputy Magistrate or of this particular Deputy Magistrate for the purpose, is not at all clear from the evidence, but it is obvious that by no stretch of imagination could it be regarded as a proceeding in the course of a judicial enquiry or any enquiry sanctioned by law, though the employment of a Deputy Magistrate and the form and manner in which the statements were recorded might easily give it the appearance of such. Satyendra was very anxious to maintain that he himself took no interest whatever in the matter, and this was quite in keeping with his general attitude that the conduct of this case was more an "affair" of the Board of Revenue than of himself (*see, for instance, Vol 16, p 455 top, p 456, ll 23-25 and p 492, ll 19-23*). He was asked if he had any idea how these men who were examined at Darjeeling came to be secured, and all that he said was that he "gave some names to Mr Lees" (*ibid, p 491, ll 16-18*), just as he afterwards gave the names of several witnesses to the

Board of Revenue for the purposes of the present trial (*ibid*, p 460, l 29) Satyendra assured the court that before he left for Darjeeling there was no idea of examining witnesses at Darjeeling or anywhere (*ibid*, p 491, ll 21-22), and he did not even know that the Rai Bahadur brought down the statements of these witnesses from Darjeeling (*ibid*, ll 11-13). He, of course, could not deny that he knew that statements were being recorded at Darjeeling, though he had no idea of what they were (*ibid*, p 488 bottom—p 489 top).

GENESIS OF DARJEELING ENQUIRY

It is not necessary for the present to pursue further the course of action taken by Satyendra following on the declaration of identity by the plaintiff, but it is a very material question in this case as to whether the enquiry which was thus commenced at Darjeeling in the way of getting statements from witnesses was initiated by Lindsay or not. It is not denied on behalf of the plaintiff that the enquiry was carried on in its subsequent stages by Lindsay and the Board of Revenue. The learned judge finds (*Vol 18*, p 316, ll 36-37) that "this enquiry that began was not, and has not been proved to have been, at the instance of the Collector, though later it went on at his instance", and I may state at once that the defendants have not been able to show anything to negative this conclusion.

On Satyendra's own showing, Lindsay had not, and could not have, suggested such an enquiry, and there is no evidence that it was directed by Lees at Darjeeling, or that the services of N K Roy were requisitioned at his instance. The defendants rely in this connection on the evidence of Lindsay himself, and refer particularly to the answer he gave to interrogatory No 16, which was in these terms —

"16 Do you know if statements of witnesses were recorded about the death and cremation of the Kumar Ramendra Narayan Roy of Bhowal when you were Collector of Dacca? Why were they recorded and under whose orders? How was a list of persons to be examined prepared?" (*Vol 2*, p 137)

Lindsay's answer was that he had arranged as Collector for statements to be recorded of people who might have witnessed the cremation of the second Kumar in Darjeeling (*ibid*, p 141, ll 1-3), and so far as he recollected, he had asked the Deputy Commissioner in Darjeeling to make a list of all the Bengalis who were in Darjeeling at that time in 1909, and statements were taken of people on that list as far as possible. As such people, he said, were widely scattered, he had sent a questionnaire asking the people on the list to answer certain questions about the cremation and the answers came in from different parts of India (*ibid*, p 141, ll 9-14).

Obviously, however, Lindsay was not referring here to the first batch of statements which commenced to be recorded at Darjeeling during the visit of Satyendranath Banerjee and Rai Bahadur Sasanka Coomarr Ghose in the middle of May 1921, but to a much later stage when it is admitted that he did send out such a questionnaire, sometimes direct to the witnesses concerned (as, for instance, to Dr Pran Krishna Acharyya, *Ex Z(335)*, *Vol II*, p 258), but more often through the Secretary to the Board of Revenue, this last named official actually calling for or arranging to obtain the statements (*see, for instance*, *Ex 443*, *Vol II*, p 238, *Ex 439*, *ibid*, p 241, *Ex 438*, *ibid*, p 243, *Ex 445*, *ibid*, p 245, *Ex 447*, *ibid*, p 254, *Ex 441*, *ibid*, p 262, and *Ex 430*, *ibid*, p 264). With reference to his answer to the above interrogatory, Lindsay was asked in cross-examination if he could state when he

had arranged for these statements to be recorded, and he said he did not remember (*Vol 2, p 152, ll 9-11*) He was further asked specifically if he knew at whose instance N K Roy examined the witnesses at Darjeeling, and his answer was that he did not remember the fact that N K Roy examined witnesses (*ibid, p 182, ll 23-25*) The other parts of Lindsay's evidence to which Mr Chaudhuri refers (*ibid, p 155, l 31, p 159, l 13, p 161, l 13, and p 163, l 14*) really do not throw any light on the point

The first of such statements taken down by N K Roy at Darjeeling at this time, which is on record, is that of Kshetranath Minkherjee, Head Bill Clerk of the Darjeeling Municipal Office, who afterwards came to depose on behalf of the plaintiff as P W 603, under the name of Swami Oankarananda Giri (*Vol 8, pp 93-100*) This statement is dated the 17th May, 1921 (*Ex Z(27), Vol II, p 227*), but it is noteworthy that the defendants have not been able to produce any list of witnesses of this or of an earlier date, prepared by the Deputy Commissioner of Darjeeling or any other official, containing the names of Kshetranath Minkherjee and other persons admittedly examined about this time, though it is obvious that if Lindsay's answer to interrogatory No 16 referred to this stage of the enquiry, such a letter would undoubtedly have been forthcoming (*Vol 2, p 153, ll 7-10*) Nor has any record been produced showing that Lindsay had at any time before the 17th May, 1921 suggested or even contemplated the collecting of such evidence at Darjeeling or elsewhere Lindsay was asked on the second day of his cross-examination if there was any paper which might help in fixing the time regarding the facts he had deposed to so far he had in fact already spoken generally of the enquiries he had made regarding the claim of the sadhu All that he said in answer was —

"There is 'J H L 2', there is the questionnaire I sent out, there is the notice to the tenants, and of course the replies to the questionnaire they will be in existence somewhere" (*ibid, p 149, ll 5-9*)

"J H L 2", I may mention, is a memorandum of an interview with the plaintiff dated the 29th May, 1921 which afterwards came to be marked as *Ex Z(358), Vol II, p 313* The "questionnaire" he sent out is one which, as will be seen later, came into existence long after the 17th May, 1921, and will be found as an annexure to a confidential letter which Lindsay himself wrote to Dr Pran Krishna Acharya on the 13th August, 1921 (*Ex Z(335), Vol II, p 258*) As regards the "notice to the tenants", it is the "Impostor Notice" which Lindsay issued on the 3rd June, 1921 (*Ex 432, Vol II, p 277*) It is impossible, therefore, to avoid the conclusion reached by the learned trial judge that this portion of the inquiry—the taking of statements of people who knew anything about the cremation, during the middle of May—was the idea of Satendranath Banerjee and Rai Bahadur Sasanka Coomarr Ghosh (*Vol 18, p 109 bottom—p 110 top*)

COMMENCEMENT OF OFFICIAL ENQUIRY

Passing on now more particularly to the course of action taken by Lindsay and the Board of Revenue, it may be stated that some of the facts to be mentioned in connection therewith help us in fixing with tolerable certainty the stage at which the officials actually came to take up the enquiry in the form of getting statements from witnesses regarding the alleged death and cremation of the second Kumar

The defence evidence is that Needham's report of the 5th May, 1909 (*Ex 59*) was delivered to Lindsay at about 9 AM the following day at a

place called Kaliganj, and that Lindsay thereupon gave directions to the Deputy Superintendent of Police Umes Chandra Chanda who happened to be present there to go to Jaidebpur and make an enquiry about the sadhu. This officer is said to have accordingly visited Jaidebpur on that day (*D W 25, Vol 12, p 489, ll 30 et seq*), and the enquiry is supposed to have consisted in his putting some questions to the sadhu at Jyotirmoyee's house. The questions were first put in Bengali to which the sadhu made no answer, but when he was afterwards questioned in Hindi, he gave his own name as Ramendra, but was unable to give the name of his wife, and he added he would give out everything if there was a meeting of "big people" and the Commissioner was present and when his Guru would arrive. The police officer was then asked by a lady of the house not to pester him with further questions. The plaintiff, it may be mentioned, does not accept this story, and it appears that Mr Chaudhuri himself put a different version of it to Jyotirmoyee in cross-examination, the police officer who went to enquire being stated to be not the Deputy Superintendent, but the Superintendent of Police, Dacca, one Mr Quarry (*Vol 8, p 363, ll 26-30*). There is evidence given by some other witnesses on the defendants' side, such as Mohini Mohan Chakravarty (*D W 117, Vol 14, pp 379-416*), Rai Sahib Jogendranath Banerjee (*D W 310, Vol 15, pp 435-539*) and Phani Bhushan Banerjee (*D W 92, Vol 14, pp 104-228*), regarding visits said to have been paid by these gentlemen to the sadhu during this period, ostensibly with the object of satisfying themselves as to his identity with the second Kumar. All this evidence will have to be fully considered hereafter, but it hardly throws any light on what Lindsay had been doing in the matter about this time.

SUPPRESSION OF OFFICIAL RECORDS

Lindsay's own testimony regarding the events of these days is really of little value. Seeing that he was deposing to events which had happened years ago, he might perhaps be excused for his faulty recollection. What is surprising is that the defendants who had it in their power to produce contemporaneous official records which might have helped the witness to refresh his memory did not for reasons best known to themselves choose to follow that straightforward course, and the surprise inevitably mingles with regret when it is remembered that the de facto defendants were a body like the Board of Revenue. The result is that an important witness like Lindsay, who was evidently called by the defendants because he could throw light on many a vital point in the case, is reduced to the position of having to say that he does not remember even such facts as, for instance, that he received a report from Needham on or about the 5th May, 1921 (*Vol 2, p 142, ll 16-17, p 169, l 23, p 171, l 5*), or that he himself drew up a report for the Board of Revenue on the 10th May, 1921 (*ibid, p 171, ll 27-29, p 174, ll 11-15*), even after the contents of these reports were specifically recalled to his mind (*ibid, pp 169-170 and pp 174-176*).

On behalf of the plaintiff it was suggested to Lindsay that shortly after Needham's report, Satyendranath Banerjee or somebody on his behalf saw him at Dacca, that Satyendra or his friend gave him copies of death and cremation certificates of the second Kumar (*ibid, p 171, ll 10-11 and p 173, ll 26-31*), and further that he was from the very beginning in consultation with Rai Bahadur Sasanka Coomarr Ghose (*ibid, p 173, ll 33 et seq*). Lindsay, of course, did not remember, but curiously, he recollected enough to be able to say that Satyendra "did not convey anything of importance to him in those days", "even less so his friends" (*ibid, p 171, ll 15-19*). It would appear, however, from the report of the 10th May that

he had with him at the time copies of the death and cremation certificates—two certificates of death, one given by Col Calvert and the other by Crawford, the then Deputy Commissioner of Darjeeling, and two certificates of cremation, one by Satyendranath Banerjee and C J Cabral, and another by Shoshu Bhushan Banerjee, a clerk in the Accountant's office, Darjeeling Treasury, and Satya Prosad Ghoshal, a clerk in the P W D Sub-Divisional office, Darjeeling. Who gave him these copies? A fact which has been satisfactorily established is that Satyendranath Banerjee made over such copies to Lethbridge in Calcutta within a week of the receipt of Needham's report, but there is no evidence to show that Lethbridge sent them to Lindsay on the other hand, there is Satyendra's statement (*Vol 16, p 489, ll 27-28*) about sending copies of the Insurance affidavits to the Collector, which is no doubt opposed to Lindsay's own statement just referred to. The report of the 10th May would show that Lindsay had already met Rai Bahadur Sasanka Coomarr Ghose, and had a consultation with him, which from all indications would appear to be a fact, and if this was so, here was a not unlikely channel through which Lindsay might have got the certificates.

LINDSAY "CONVINCED" FROM THE BEGINNING OF KUMAR'S DEATH

At the date of this report Lindsay had apparently "convinced" himself of the death of the second Kumar. "There is no doubt whatsoever", he writes, "that the man (that is, the second Kumar) is dead and that the Court of Wards has been perfectly justified in acting on the assumption of his death ever since it took charge of his estate". In his evidence Lindsay says that he had been told the story of rain and storm at Darjeeling on the night of the Kumar's supposed death, and it was from this "rain-story" that he was convinced "from the first", and "convinced beyond reasonable doubt", that the plaintiff was not the second Kumar (*Vol 2, p 142, ll 26 et seq and p 144, ll 24-25*). He had the story checked up at once by reference to the "rainfall records" of the time from the Calcutta Gazette (*ibid, p 142, ll 26, et seq*), and was satisfied that there had been no rain at all at Darjeeling on that night. In the report of the 10th May, however, he mentions only the certificates of death and cremation, and nothing about this checking of the rainfall records, which, it may be taken, therefore, followed at a later stage. Lindsay finds it hard to say when in fact he first heard the story or from whom he heard it (*ibid, p 160, ll 15-17*).

One important point may be observed here, and it is that Lindsay makes it quite clear in his evidence that at no stage did he want any statements of witnesses to be recorded in order to satisfy himself as to the death of the Kumar, for he was quite satisfied about it from the beginning. All that he wanted was to get information, not on the question of death, but as regards "the incidents at the death", or as he puts it otherwise, "the incidents on the occasion of the cremation" (*ibid, p 161, ll 26-27 and p 162, ll 1-6*), which to my mind is sufficient refutation as far as one can get from Lindsay's mouth of the theory that the Darjeeling enquiry had been initiated by him or at his instance.

The earliest document on record after the 10th May, 1921, showing further action taken by Lindsay in the matter of the sadhu, is E.C. 436 (*Vol II, p 229*), being a confidential D O from him to Lethbridge, dated the 25th May, 1921, with which he was forwarding for the information of the Member of the Board of Revenue, the statements of witnesses examined at Darjeeling, which, there is every reason to suppose, Rai Bahadur Sasanka

Coomar Ghose had brought down with him from Darjeeling Lindsay also sent along with these statements the opinion of the Standing Counsel, Mr B L Mitter, which has been already referred to (*Ex Z(357)*, Vol II, p 218), and another document which has been described as "Notes by the Government Pleader of Dacca recorded at Darjeeling"

It is worth while pointing out here that these Notes have not been produced by the defendants at the trial, though Lindsay was cross-examined about them (*Vol 2*, pp 164-165), and the plaintiff left the defendants in no doubt as to the case he was making thereon. It was definitely suggested on behalf of the plaintiff that Rai Bahadur Sasanka Coomar Ghose while at Darjeeling had been going about and seeing the parties whose statements subsequently came to be recorded, and that he and his friend Satyendranath Banerjee were in fact the "principal actors" in the proceedings which were going on there (*ibid*, p 163, ll 30-31, p 164, ll 12-15, ll 27-30, ll 32-34, and p 165, ll 5-7 and ll 27-30). Obviously, it should have been the easiest thing for the defendants to have contradicted this case by the production of the Notes, if not by other trustworthy evidence. As it is, on such an important question as that of the circumstances which led to the recording of the statements at Darjeeling, the defendants have chosen to leave the court in the very unsatisfactory position of having to rely solely on the uncertain testimony of Satyendranath Banerjee.

Rai Bahadur Sasanka Coomar Ghose could no doubt have thrown considerable light on this as on other important points in the case, having admittedly taken an active interest in various proceedings and transactions on behalf of the defendants from the very outset. His position in this respect would indeed appear to have been very much like that of a solicitor engaged in collecting materials for the preparation of his client's case. One cannot help regretting, therefore, that by his acceptance of a brief as one of the defendants' lawyers at the trial, the court was deprived of the valuable assistance he might have given from the witness-box.

Apart from the documents already referred to, there were other documents consisting mostly of official correspondence of a revealing character which were put to Lindsay in the course of his cross-examination, but none of which the defendants have cared to disclose, and it is an interesting question how far their non-production is sufficiently explained by a claim of privilege which the defendants chose to put forward in answer to the demand made by the plaintiff who specifically called for these papers by a sworn petition of the 6th September, 1934 (*Vol 10*, pp 104-129), not to mention other similar petitions submitted by him from time to time both before and after that date (as, for instance, his petition of the 24th July, 1931, *Vol 2*, p 70).

It seems to me to be fully established on the evidence as it stands that it was only after Rai Bahadur Sasanka Coomar Ghose had placed the first batch of statements of Darjeeling witnesses before Lindsay, which as already stated the latter forwarded to Lethbridge by his D O of the 25th May, 1921, that Lindsay set about getting statements of other witnesses on similar lines. Whether he did so of his own accord, or was moved to take such action at the instance of Rai Bahadur Sasanka Coomar Ghose, is again a question which might have been easily cleared up by the defendants by the production of official records, but they did not choose to do so. There is evidence on the defendants' side from D W 435, a Deputy Collector of the name of Romesh Chandra Datta, then in charge of the Wards Department of the Dacca Collectorate, that this gentleman confiden-

nally recorded the statements of a number of witnesses at Dacca about this time under the orders of Lindsay given as Collector of the district (Vol. 17, p. 411, II. 11-12), and it is to be noted that the earliest statement which he says he recorded was that of Debabrata Mukherjee a subordinate judge (*ibid.*, p. 411, II. 21-23 26-27), which was on the 26th May, 1921, that is, just one day after Lindsay's said D O letter (See the statement, Ex. 2(110), Vol. II, p. 231).

It may be added here for what it is worth that according to plaintiff's definite suggestion put to the witness in cross-examination, Lindsay in fact wrote a letter on the 27th May 1921, to Lees Member of the Board of Revenue, at Darjeeling that the Government Pleader had gone to Calcutta to obtain the names and statements of witnesses present there who could give evidence about the cremation of the second Kumar, and that from Calcutta he was going to Darjeeling again to see Lees. In the meantime, Lindsay had secured some photographs of the second Kumar which he was forwarding to Lees with a request that Lees might make them over to the Government Pleader, adding that they should be useful in taking statements of people who saw the dead body on the funeral pyre. The contents of this letter were put to the witness (Vol. 2 p. 157 l. 26—p. 158, l. 3), but he, of course, did not remember, nor did the defendants care to produce the letter.

SISTERS' PETITION TO LINDSAY FOR ENQUIRY AS TO IDENTITY

The next fact which requires to be mentioned is that somewhere about the fourth week of May, 1921, a petition was filed before Lindsay by Gobinda Chandra Mukherji, husband of the late Indumoyee Devi eldest sister of the Kumar and the other two sisters of the Kumar, Jyotirmoyee Devi and Tanumoyee Devi asking for an enquiry as to the identity of the sadhu who was claiming to be the second Kumar. Admittedly no action was taken on this.

Jyotirmoyee Devi says that this petition was filed in consequence of a letter which Ram Satyabhama Devi, the grandmother, had received about this time from the Maharajadhiraj of Burdwan (Vol. 8, p. 508, II. 32-35). This letter has been produced by the plaintiff and is an interesting document (Ex. 266, Vol. II p. 177) the genesis of which, however, remains unexplained except by what the writer himself says in the letter. The Maharajadhiraj was then a Member of the Executive Council of the Governor of Bengal and was in charge of the department having control over the Board of Revenue and necessarily over all Courts of Wards in the Presidency. The letter is dated Darjeeling the 16th May, 1921 and purports to be a communication from him to Ram Satyabhama Devi as the then seniormost member of the Bhowal Raj family, which he says he was writing, not as a Member of the Government, but "as a friend apprehending lest the glory of an old Raj family should be impaired". He asks in it if the Raju has seen the man who was declaring himself as the second Kumar of Bhowal and what impression she has formed in her mind. She must know that dead men do not come back to life, but says the Maharajadhiraj, "if there be any other hidden mystery in respect of the death of the Kumar which the general public do not know, that is the dead man who was burnt is or was not the Kumar but somebody else and since that date the Kumar disappeared and has reappeared now in the garb of a sanyasi—? This is a different matter—and in that case a highly amazing incident in the

family will be revealed" There can be no question that the letter fully confirms the statement of Jyotirmoyee Devi

In the course of Lindsay's cross-examination, the plaintiff put to the witness a letter—again a document not produced by the defendants—which Lindsay is supposed to have written to Emerson, Commissioner of the Dacca Division, on the 1st June, 1921, specifically referring to a petition which had been filed before him as District Magistrate by Gobinda Chandra Mukherjee and the two sisters of the Kumar, Jyotirmoyee Devi and Tarinmoyee Devi (*Vol 2, p 190, ll 5-12*) Lindsay as usual did not remember anything about it, though earlier in his evidence, on being asked if the grandmother and the sisters and the public had repeatedly asked for an enquiry into the identity of the person who claimed to be Kumar, he had said, "I think there were such applications" (*ibid, p 158, ll 26-29*). Lindsay did not recollect, however, if anything was done on such applications On his evidence there was, of course, very little left for him to do in the way of an enquiry on the lines suggested in these petitions

As early as the 10th May, 1921, if not earlier, Lindsay had formed the "conviction"—on whatever materials it might have been—that the second Kumar was dead and that the sadhu could not be he An enquiry for the purpose of establishing or dis-establishing the identity of the claimant would not only, therefore, not be necessary, but it might, on the other hand, encourage the agitators who were propounding this impostor by producing a belief in the public mind that the authorities themselves entertained a reasonable doubt in the matter

The only question which apparently troubled Lindsay from the beginning was whether any, and if so, what legal action was to be taken against the man who was posing as the second Kumar, and as has been already seen, opinion of the Standing Counsel was in fact sought and obtained on the point The evidence which afterwards came to be collected at Lindsay's instance was, as he said, only for the purpose of getting information about the "incidents" which took place at the time of the cremation, and there could, of course, be no question of his letting the other side know what that evidence was In fact, as he came to state afterwards in a letter of the 9th August, 1921 to the Commissioner (*Ex 435, Vol II, p 336*), the evidence was being kept "confidential" and even the names of witnesses were being kept a closely guarded secret

ENQUIRY REFUSED

All the same it seems to be fairly clear that Lindsay was being pestered on behalf of the plaintiff to grant him an opportunity of producing evidence of his identity, and however much his personal inclinations might have been against such a course, he did not probably think it wise to give a point-blank refusal to the demand,—at any rate he felt he should not do so without express instructions from the higher authorities There was obviously this to be said in favour of allowing evidence to be recorded, namely, that by agreeing to do so, he might with justification call upon the tenants to stop payment of subscriptions with a view to financing a civil suit by the plaintiff to establish his identity The attitude of the tenants must have been sufficiently clear to him, specially after the formation of the Bhowal Taluqdar and Proja Samiti, and it is the defendants' own case that by their propaganda the tenants were helping to raise large subscriptions for the plaintiff to enable him to go to the civil court, if necessary

MISLEADING SUGGESTIONS TO PLAINTIFF

As early as the 5th May, 1921, it will be observed, Needham in his report to Lindsay (*Ex 59*) had suggested "a sifting enquiry about the sadhn" (*Vol II, p 213, ll 10-11*), and as Mohini Mohan Chakravarty, D W 117, who is supposed to have drafted the report for Needham along with Rai Sahib Jogendranath Banerjee, D W 310, explains (*Vol 14, p 403, ll 32-33 and p 410, l, 19*), by this they meant an "enquiry into the identity of the plaintiff" No such enquiry was, however, held by Lindsay then or at any time later, and it is perfectly clear that he was not minded to do so at any stage Yet from his own record of an important event to which reference will be presently made, namely, a meeting which the plaintiff had with him on the 29th May, 1921, it will appear to be a fact that at this interview Lindsay did give the plaintiff to understand that if the plaintiff preferred to produce evidence of identity before him, he was willing to record it (*Ex 2(358), Vol II, p 313*) This was doubtless put as an alternative to a suggestion that the plaintiff could prove his identity in court, but if Lindsay's memorandum of this incident is to be relied on, as the defendants contend it should be, there can, to my mind, be no escape from the conclusion that Lindsay was here misleading the plaintiff

It seems to me to be an idle pretence to suggest, as the defendants wanted to do, that Lindsay did in fact intend to hold an enquiry into identity, but could not do so merely because the plaintiff's pleaders who promised at the interview to file a petition the next day for such an enquiry failed to present one

For one thing there is no evidence to show that such a petition was not filed on the other hand, as already seen, we have Lindsay's own admission that there were repeated applications for enquiry from the grandmother, the sisters and the public (*Vol 2, p 158, ll 26-29*) Then again the fact remains, as deposed to by Jyotirmoyee Devi, that at least one such petition had been presented by Gobinda Chandra Mukherjee, Jyotirmoyee herself and her sister Tarinmoyee (*Vol 8, p 308, ll 32-33*) It may be that this petition had been filed shortly before the interview, for Jyotirmoyee says it was done during the five days' visit of Tarinmoyee to her, and according to her earlier statement (*ibid, p 305, ll 30-31*), Tarinmoyee had come to her house three or four days after the big meeting of the 15th May, 1921 Even so, one fails to see what was there to prevent Lindsay from taking action on this petition The real answer will appear to have been provided by Lindsay himself in his evidence (*Vol 2, p 159, ll 1-5*) —

"Q—Was there anything that stood in your way to prevent you from holding an impartial and sifting enquiry in this matter?

"A—I don't know Except my own conviction that he was not the Kumar and that the claimant could do what he has done now, namely, attempt to prove that he was the Kumar in open court "

The only regret is that Lindsay would not open his real mind either to the plaintiff or to any one on his behalf at the time Having somehow or other persuaded himself to believe that the second Kumar was dead, all his efforts seem to have been directed towards collecting details of the "incidents" which were said to have happened at the death or cremation of the second Kumar, and devising action to put down the sadhn and his supporters,—acting presumably at every step in close consultation with the Government Pleader Apparently, however, he was not prepared to say openly

to the plaintiff that he refused to hold an enquiry into his identity as the plaintiff demanded

LINDSAY'S WARNING NOTICES

On the 28th May, 1921, it appears Lindsay actually issued an order, which Needham caused to be circulated, warning all officers of the Bhowal Court of Wards Estate that so long as the Court of Wards Estate did not acknowledge the sadhu as the second Kumar, none of them should do anything to inspire confidence in the people that the sadhu was the second Kumar if any officer did so, it would be taken as if he was acting against the Court of Wards and he would be punished. It was added that the Court of Wards alone would decide if the sadhu was the second Kumar (*Ex 206, Vol II, p 276*)

PUNJAB ENQUIRY

About this time Lindsay took another important step which in its sequel came to be a vital part of the defendants' case touching the identity of the plaintiff, for it appears that on the 31st May, 1921, under instructions from Lindsay, a police officer of the name of Momtazuddin Talukdar (*D. IV, 403, Vol 17, pp 223-252*) and a steward of the Raj Estate named Surendra Kumar Chakravarty (*D IV 408, ibid, pp 268-287*), were in Calcutta on their way to the Punjab in an attempt to trace out the antecedents of the sadhu who had been claiming to be the second Kumar. As to who supplied Lindsay with definite information that the sadhu was a Punjabi, what led him to think that such an enquiry in the Punjab was necessary or would lead to any fruitful results, whether the enquiry was his own idea or somebody else's, how it came about that neither he nor even Needham, but Bibhabati Devi was the first to receive a wire saying, "Antecedents traced everything finished" (*Vol II, p 333 top*)—are only some of the many intriguing questions arising out of this Punjab investigation to which there are no satisfactory answers. All that need be stated here is that this enquiry was evidently found enough by Lindsay to satisfy himself that the plaintiff was no other than one Sunderdas, a disciple of Baba Dharam Das—the Guru whose name was tattooed on the plaintiff's arm;—the original name of Sunderdas before he became an ascetic being stated to be Mal Singh, an inhabitant of village Aujla in the district of Lahore.

LINDSAY'S INTERVIEW WITH PLAINTIFF ON MAY 29, 1921

Coming now to the interview the plaintiff had with Lindsay, which it is admitted took place at Lindsay's house at Dacca on the 29th May, 1921, it is undoubtedly an event of great significance in the history of the case. The plaintiff relies very strongly on the fact of the interview, while the defendants attach greater importance to the record of the interview which Lindsay drew up in the shape of a memorandum, produced by the defendants and marked as *Ex 2(358)* on their side (*Vol II, p 313*)

There can be no doubt that this face to face encounter of the supposed "impostor" with the Collector of the district took place at the instance of the impostor himself. Mr Chaudhuri wanted to suggest that the plaintiff must have been sent for by Lindsay, but frankly stated that there was no evidence to support this. He referred to a letter of the 27th May, 1921, which Brojolah, husband of Tarinmoyee, wrote from Dacca to Jyotirmoyee, asking her to come to Dacca once with the Kumar (*Ex 45, Vol II, p 312*).

in the following terms — "The sadhu appeared to be an up-country (man) with a beautifully clear skin with no signs of syphilis. His hair was golden rather than red like Atikullah's."

The memorandum itself shows that Lindsay was putting questions to the plaintiff, and the account which is to be found in it so far as it goes can, therefore, be only a record of such facts as Lindsay understood the plaintiff to be giving in his answers. In order to test the value of this record, it is relevant to consider what questions Lindsay might reasonably be expected to have put or not put to the plaintiff, and for this purpose it is important to know in the first place what materials regarding the plaintiff were in his possession at this date, and secondly, what was the object he had in view in questioning the plaintiff.

Lindsay had undoubtedly with him for some considerable time Needham's report of the 5th May, 1921 (*Ex 59, Vol II, p 212*). Then, there were the facts mentioned by Lindsay himself in his report of the 10th May, 1921. His D O letter to Lethbridge of the 25th May, 1921 (*Ex 436, Vol II, p 229*), again, shows that he had since obtained the statements of a number of persons examined at Darjeeling claiming to have personal knowledge of the second Kumar's death and cremation,—only one of such statements being on record, that of Kshetranath Mukherjee, dated the 17th May, 1921 (*Ex Z(27), Vol II, p 227*). Lindsay had also the notes of Rai Bahadur Sasanka Coomar Ghose made at Darjeeling, referred to in the same letter, which as already pointed out the defendants have not produced. Lindsay must likewise have got with him the statement of another witness Debabrata Mukherjee (*Ex Z(110), Vol II, p 231*), recorded at Dacca under his order on the 26th May, 1921, by Romesh Chandra Datta, Deputy Magistrate, D W 435. There was doubtless another useful channel of information also open to Lindsay—Rai Bahadur Sasanka Coomar Ghose, the Government Pleader, and through him, Satyendranath Banerjee,—only that the defendants would not allow it a free flow.

There is one important fact of which Lindsay could not possibly have been in ignorance at this time, and it is that it was being freely given out on the plaintiff's side at Jaidebpur that the second Kumar had been poisoned at Darjeeling. Satyendranath Banerjee admits in his evidence that before he left for Darjeeling in the company of Rai Bahadur Sasanka Coomar Ghose, he had received a telegram from the Assistant Manager Mohini Mohan Chakravarty, which "disclosed the charge of poisoning against him and a doctor" (meaning Dr Ashutosh Das Gupta), and he showed this telegram to Lethbridge (*Vol 16, p 490, ll 35-37*). That such a charge was being openly made at Jaidebpur is also confirmed by the evidence of Mohini Mohan Chakravarty, D W 117 (*Vol 14, p 384, ll 10-13*), and it is in fact defendants' own case as stated to us by Mr Chaudhuri that the poisoning story was started about the 8th May, 1921, in consequence of which Dr Ashutosh Das Gupta had to run away for his life from Jaidebpur.

From a document to which reference will be made later (*Ex 443, Vol II, p 238*), it will appear that by the 3rd or 4th June, 1921, a statement had been made available to the Board of Revenue containing what was described therein as "*The Story of the Sadhu*." There is no direct evidence as to who supplied the Board of Revenue with this story, but if, as is not unlikely, it came to them through Lindsay, Lindsay may be taken to have known about it before the plaintiff's interview with him.

It will be seen, therefore, that there was no lack of materials in Lindsay's possession with which he might have confronted the plaintiff when he turned up before him on the 29th May, 1921.

Lindsay was asked what was his object in questioning the plaintiff at the interview, and he said that he wanted to find out the explanation how a man who had been cremated in Darjeeling twelve years before could possibly be alive at the time (*Vol 2, p 146, ll 11-14*) To a further question, what led him to make a memorandum, he replied, "I am not sure I wanted to get the man's own statement of his case as early as possible I think that was the idea" (*ibid, p 147, ll 9-11*)

How, according to his memorandum, did Lindsay carry out this object? It is significant that the memorandum does not show any attempt on his part to verify at first hand from the plaintiff himself any of the facts regarding his antecedents which Lindsay must have been apprised of Not a single question is asked as to where the plaintiff had been or what he had been doing during the twelve years of his disappearance Not a word is put to him regarding the tattoo-mark on his arm which Lindsay now recollects the plaintiff showed him at the interview Not even a note is to be found as to whether the plaintiff said anything about the charge of poisoning, or whether he was at all questioned about it

Mr Chandhuri suggested that it was quite enough for Lindsay's purpose to have put only a few test questions, but if that was so, one wonders why the most important test, that of the plaintiff's ability to speak Bengali, was not put to him, or why he was not definitely asked, for instance, to give the names of the doctor or doctors who had treated him in Darjeeling or of the persons who had accompanied him there, or to give some details of the topography of Darjeeling How would it serve Lindsay's object if all that he was able to elicit from his interviewer was that he did not remember the name of the house at Darjeeling where he is supposed to have put up, or that he was suffering only from a boil for which "there was no special cause", or that he recovered his senses in the presence of only *one* sadhu, or that the sadhu told him that he had found him lying on the ground as if he had been thrown there, or that the sadhu did not say whether he had found him in the day or at night?

It is worthy of note that defendants have given no evidence to show that at the date of the interview Lindsay knew or had been told of any facts about the second Kumar from which he was in a position to conclude that the answers which the plaintiff gave as recorded in the memorandum at once belied his identity with the second Kumar

The only answer by which the plaintiff may be supposed to have given himself away is the statement imputed to him in the memorandum that he had been ill of "pneumonia" at Darjeeling for two or four days As to this, it is enough to refer to the very pertinent observations of the learned trial judge at *p 305 of Vol 18* It is common case that the conversation was carried on in Hindi (*Vol 2, p 139, l 13, and Vol 4, p 115, ll 11-12*) Lindsay no doubt says that he was conversant with Hindi and Bengali (*Vol 2, p 142, l 3*), but as the learned judge points out, the extent of his ability to follow Hindi is not known There is on the other hand a letter from Lindsay himself, dated the 28th August, 1921, on record (*Ex Z(352), Vol II, p 341*), in which he says that he is waiting to go down to interview the plaintiff's Guru Dharam Das till Quarry returns from tour, as "Quarry knows that up-country language to perfection and will be able to talk to the man much better than I" Apart from this, it is not shown, whether on the plaintiff's evidence or on that of the defendants, that this case of "pneumonia" at Darjeeling had been made or suggested by or on behalf of the plaintiff to anybody at any stage If the plaintiff was an

impostor, is it reasonable to suppose that when he went to Lindsay, whether asked or unasked, he should for no intelligible reason whatever be suddenly making such a material departure from his story of poisoning, though he must have known that this story had been in circulation right from the beginning? If, on the other hand, the plaintiff be supposed to be the real Kumar, is it not equally unlikely for him to have made such a stupidly false statement? What is more probable is the suggestion which was put to Lindsay in cross-examination —

"Q Did he (plaintiff) say he suffered from *diarrhoea* at Darjeeling?"

His answer was — "I do not know anything except—(shown 'J H L 2' —the memorandum) from this document I see I recorded "pneumonia" I have no recollection of doing so"

Further pressed if he could swear he had not made a mistake in recording, Lindsay said "No" (Vol 2, p 147, ll 4-8)

Not much stress can be laid on the plaintiff's supposed mention of only one sadhu to Lindsay, as recorded in the memorandum, notwithstanding that in answer to a leading question from defendants' learned counsel, Lindsay's recollection becomes unusually definite on this particular point, though it was apparently not a point of much consequence at that stage

Lindsay, as already pointed out, makes a marginal note in the memorandum that the sadhu appears to be an up-country man with a beautifully clear skin, with no signs of syphilis. What, one may ask, led him to look for syphilis on the plaintiff? There is no evidence, the documents on record certainly do not show, that any report was current anywhere at this stage about the second Kumar having suffered from such a complaint. Supposing that Lindsay had got the information from Rai Bahadur Sasanka Coomar Ghose or Satyendranath Banerjee or any other source, one wonders why in that case Lindsay was content with merely making a note that the plaintiff had no signs of syphilis, instead of putting him a specific question as to whether he had syphilis or not when he had gone to Darjeeling

It remains a fact,—at any rate the defendants have not given any evidence to the contrary,—that Lindsay did not send a report of this interview to any of the higher authorities, as it is only reasonable to suppose he would have done, had anything important really come out of the plaintiff's mouth at this meeting. If Lindsay was writing to Emerson, Commissioner of the Dacca Division, on the 1st June following, as the plaintiff suggests he did (Vol 2, p 190, l 6), this letter should doubtless have contained a reference to the interview, but as already stated, the defendants have not produced this document

It seems to be quite clear that Lindsay did not attach any importance whatever to this interview, far less anything like the importance which learned counsel for the defendants would ascribe to it now

It is somewhat remarkable that though the defendants rely so strongly on this memorandum, not a single question was put to the plaintiff on the subject in cross-examination. Plaintiff had referred to his interview in his examination-in-chief in the following terms —

"While I was at Tannmoyee's house I met Mr Lindsay, Collector of Dacca. I met him at his house. I went with Peary Lal Ghosh, a resident of Dacca. He was a pleader. Sarat Chakravarty, another

pleader came with me Rajendra Babu, Zemindar of Srinagore, also came with me Sarat Babu is dead" (Vol 4, p 108, ll 18-22) Later, he gave to his counsel a specific denial of the statements ascribed to him in Landsay's memorandum This is what he said —

"It is false that I told Mr Landsay I had 'pneumonia' at Darjeeling It is false that Mr Landsay asked me the name of the house at Darjeeling, or that I forgot to give it It is false that I had told him I had an abscess It is false that Mr Landsay asked me when I had gone to Calcutta last before going to Darjeeling or that I said 'I did not remember' It is false that I told him that when I returned to consciousness only one sannyasi was present Mr Landsay during my interview with him recorded nothing He talked in Hindi I also replied in Hindi" (*ibid*, p 115, ll 4-12)

Mr Chaudhuri probably did not think it safe to try and elicit from the plaintiff his version of the interview, when the witness had not given any account in his evidence-in-chief All that learned counsel did before us was to point to two petitions filed on behalf of the plaintiff on the 22nd and 25th January, 1935, respectively (Vol 11, p 504 and Vol 12, p 12), showing that one "Lala Rajendra Kumar Bose, Zamindar, living at Zinda-bahar, Dacca Town", whom Mr Chaudhuri would identify without any evidence as the "Rajendra Babu of Srinagore" named by the plaintiff, had been cited as a witness, but was not actually called Of the other two persons who are said to have accompanied the plaintiff, Sarat Chandra Chakravarti was already dead, as stated by the plaintiff himself, and it is now admitted before us that Peary Lal Ghosh had also died

It may be pointed out here that in the memorandum as printed in Vol II, at p 113, only two names are mentioned, Sarat Chandra Chakravarti and Peary Lal Ghosh, and then follow the words "*and I think the Kashimpur Manager*" A reference to the original document which was written in ink will, however, show that the words "*I think the Kashimpur Manager*" are enclosed in brackets in pencil, and on the top of them there is a faint overwriting in pencil, "Rajendra Nath Bose, Zr of Srinagar" ('Zr' being obviously a contraction for 'Zemindar') Landsay's attention was drawn to these pencil alterations, but he was evidently not in a position to give any explanation, nor did he say that the writing was in his hand (Vol 2, p 146, ll 25-32) The word "Joydebpur" in the memorandum is also cut out in ink, but Landsay's initials appear under it (*ibid*, p 146, ll 34-36)

RECORD NOT RELIABLE

Considering all the circumstances, I have no hesitation in coming to the conclusion that Landsay's memorandum is a document on which it would not be safe to place any reliance for the purpose indicated by Mr Chaudhuri Not only is it difficult to accept it as a full or reliable record of what the plaintiff said, but apart from the obviously incorrect reference to "pneumonia" in it, it does not, in my opinion, establish such ignorance of vital or material facts on the part of the plaintiff as may tend to throw suspicion on the story as unfolded at the trial The identical story is, in fact, traceable in its essential outline in the record as it stands, meagre and perfunctory as the record is—the story of passing into a state of unconsciousness which was mistaken for death, finding of the body at the cremation ground in a wet condition, and subsequent rescue from that place

There remains one other significant circumstance to be noticed in this connection, and it is that the memorandum does not show, nor does Landsay

say or suggest in his evidence, that the plaintiff refused or showed any disinclination to answer any questions. It was certainly not his fault, therefore, if the opportunity was not taken to elicit from him more facts which might have pinned him down completely to a definite and detailed story. The defence case is that the plaintiff had declined to give any information about his previous history to the Court of Wards officials after the "*Atma Parschaya*", but had given out that he would prove his identity, if necessary, when the time came before the higher authorities. See Mohini Mohan Chakravarty's report to Needham of the 6th May, 1921 (*Ex 2(203)*, Vol II, p 215, ll 9-11, 17-20 and 34-35), see also, among other witnesses, D W 25 (Vol 12, p 489, ll 30-33). In his report of the 10th May, 1921, Lindsay himself states that the plaintiff had told the Superintendent of Police that he wanted the Commissioner, the District Magistrate and the leading gentlemen of Dacca to convene a meeting at which he would satisfactorily establish his identity. What was there, then, to prevent Lindsay from questioning the plaintiff at the interview in order to test his identity as far as he could? Is it to be believed that the plaintiff was so astute and Lindsay so simple-minded that the plaintiff was able to put him off by a mere offer to file a petition the next day for an enquiry?

ISSUE OF IMPOSTOR NOTICE

As was to be expected, the interview produced no change in Lindsay's attitude. His course had already been set. He is not now certain whether the tenants of the estate had actually started paying rent to the plaintiff, but "there was certainly an apprehension of payment of rent to him" (Vol 2, p 185, ll 35-36). Thus, of course, had to be stopped. On the 28th May, 1921, as stated before, he had issued a *purwana* to the officers of the estate that they must not "inspire confidence in the people" that the sadhu was the second Kumar (*Ex 206*, Vol II, p 276), but something had to be done about the tenants. He was quite clear that the Board of Revenue could not acknowledge the plaintiff as the second Kumar. There was no reason to suppose, therefore, that the Board would not approve the issue of a warning notice that any tenant paying rent for the share of the second Kumar to anybody except to the Court of Wards would do so at his peril. He might have had a feeling in his mind that if he allowed the plaintiff to produce his evidence of identity before him, he would have greater justification for telling the tenants that there was no necessity for them to pay any money to the plaintiff. But evidently some action had to be taken. It is not known if he consulted his adviser the Government Pleader in the matter, or the Government Pleader went up to Darjeeling again to see the Member of the Board of Revenue on the subject. The fact that appears on record is that on the 3rd June, 1921, Lindsay actually issued a notice in Bengali in the following terms, which was broadcast throughout the estate —

"NOTICE

"All the tenants of the Bhowal estate are hereby informed that the Board of Revenue has got *conclusive proof* that the dead body of the second Kumar of Bhowal was burnt to ashes in the town of Darjeeling twelve years ago. So the sadhu who has been declaring himself as the second Kumar is an impostor

Any one who will pay rents or subscriptions to him will do that at his own risk

/ "By order of the Board of Revenue,
J H LINDSAY,
Collector, Dacca,
3-6-21 "
(Ex 432, Vol II, p 277)

The notice, it will be seen, goes very much beyond warning the tenants not to pay rents or subscriptions to the plaintiff except at their own risk. It declares that the Board of Revenue had "*conclusive proof*" that the dead body of the second Kumar had been cremated. What was this "*conclusive proof*", Lindsay was asked in cross-examination. The reply he gave was characteristic: "I do not know, beyond the death certificate and the absence of rain" (Vol 2, p 189, l 11). There were doubtless also the statements of some witnesses in his possession at this date, but he did not refer to them. It was suggested on behalf of the plaintiff that the number of such witnesses examined at Darjeeling before this date was only four, of whom three had not known the Kumar before and the fourth had not gone to the cremation ground, while none of them had seen the body (*ibid*, p 189, ll 15-17). Of these statements, that of Kshetranath Mukherjee only is on record (Ex 2(27), Vol II, p 227). As to whether these statements, even if Lindsay be supposed to have relied on them before making the impostor declaration, could really be regarded as "*conclusive proof*" of death and cremation, is perhaps not very material, except as indicating the extent to which Lindsay was prepared to go at this stage. Certain other statements, it may be added, were recorded at Darjeeling on the 2nd June, 1921 (Vol II, pp 233, 234 and 235), but obviously these could not have been available to Lindsay before the issue of the notice.

The publication of this impostor notice apparently produced considerable public feeling, and had an unfortunate sequel. It led to a riot at Mirzapur on the 10th June, 1921, in course of which the police had to open fire and a man named Jhumar Ali was shot dead. A riot case was started against some of the tenants, and there was a counter-case of murder against the police (*see Lindsay's cross-examination*, Vol 2, pp 192-193, D IV 3, Vol 12, pp 128-129, and Jagadish Chandra Chowdhury, Vol 2, p 92, ll 28 et seq). The case against the tenants ended in their acquittal, and it is said one of the two police officers implicated in the other case confessed guilt.

"THE STORY OF THE SADHU"

A further stage in the enquiry regarding the plaintiff which, as indicated before, had by now been taken up by the Board of Revenue, is evidenced by a letter of the 7th June, 1921 from Lethbridge to S W Goode, the then Deputy Commissioner of Darjeeling, written under the direction of Lees, Member of the Board, forwarding a list of 8 persons whose statements were required to be recorded by N K Roy at Darjeeling (Ex 443, Vol II, p 238). Along with this list was a paper containing "The Story of the Sadhu" to which reference has already been made, as well as a list of interrogatories to be put to the witnesses. This document contains an endorsement of the Government Pleader, Rai Bahadur Sasanka Coomar Ghose, under date 3-6-21, showing quite clearly his connection with this proceeding.

The "Story of the Sadhu", which the learned judge sets out at p 317 of l of 18, is a very interesting statement and requires more than passing

notice. It gives a number of significant details such as—(1) that the Kumar was declared to be dead "on the *midnight* of the 8th May, 1909", (2) that the body was, *placed on the funeral pyre*, and before it was set on fire, heavy storm and rain came on, which drove away the attendants, (3) that when the attendants returned and found the body gone, they set fire to the empty pyre and went back home with the story that the body had been cremated, and (4) that after the attendants had run away, a sannayasi came up and perceiving that life was not extinct, removed the body to his quarters and by the application of some charm brought it back to life.

Not content with giving this story, the statement goes on to add a few comments and helpful suggestions. In the first place, care is taken to point out that the story is "considered absurd and untrue", and it is then stated that some interrogatories are attached to the document to indicate the lines on which statements of witnesses are to be taken. Then follow some details about the second Kumar such as that he was a man of "very fair complexion, of stout build, of strong physique, with brownish hair", and was 27 years of age when he died in a house called "Step Aside" below the Mall. There were with him at the time his wife, her brother, a few officers and some menial servants. It is then added that "*the rainfall report of the time shows that there was no rain either on the 8th or on the 9th in Darjeeling*". At the end of the questionnaire, comprising a set of seven interrogatories, there is a N.B.—"Whole rupees and small bits of coin were scattered and given to the poor during the procession."

A number of questions start up at once out of this document, to which I have looked in vain for an adequate answer from the defendants' side. The first question that arises is, 'Who supplied the story'?

POSSIBLE SOURCES OF THE STORY

Lindsay's memorandum of the 29th May, assuming it to be a correct record, could not possibly be the source, as this gives a very bald version compared with what is stated here, without any circumstantial details such as that the body had been placed on the funeral pyre and an empty pyre set on fire. Nor could the story be derived from any report prevalent at the time at Jaidebpur in the plaintiff's camp. There is in fact no evidence that any story, far less such a story, had been given out at Jaidebpur by or on behalf of the plaintiff,—the evidence on the defendants' side being just the other way, namely, that the plaintiff was refusing to disclose any facts regarding his past history. The case put to Jyotirmoyee in cross-examination was that the plaintiff on being asked about his past history could give no answer, and that then when further questions were sought to be put, members of the family intervened saying, "He will not answer any questions now and will do so before higher authorities" (*Vol 8, p 363, ll 19-24*). The only story that had been current from almost immediately after the *Aima Panchaya* was that of poisoning which is confirmed by the defence evidence itself, but no mention is made of poisoning in the official version of the plaintiff's story, if one might so describe it.

It will not do to suggest that a basis might have been supplied for the story by the rumour referred to in Ram Satyabhama's letter of the 3rd September, 1917, to the Maharajadhiraj of Burdwan, which as stated therein was to the effect that after the second Kumar's death his body was taken to a cave for performing funeral rites, but owing to a severe storm and heavy shower setting in at that time, the cremation party put fire to his mouth and left the body at that place without burning the same, that

then an ascetic came with his followers, took him away and made him alive (*Ex Z(33), Vol II, p 175, ll 25-31*) The story and the rumour, it will be seen, do not entirely correspond the rumour suggests that the body was on the funeral pyre and "mukhagni" (literally, application of fire to the mouth) was performed when rain and storm came on, whereas the story is that storm and rain came on before the body was set on fire. Agam, according to the rumour, the man was dead and a sannyasi "made him alive", but according to the story the sannyasi, perceiving that life was not extinct, brought back the body to life by the application of some charm. It is further to be observed that the rumour does not mention the hour of death as midnight. Besides, there is nothing to connect the plaintiff with this rumour. Moreover, on the defendants' own case as stated by D W 92 (*Vol 14, p 131, l 37*), it was a short-lived rumour and was killed as soon as Rani Satyabhama got the reply of the Maharajahdharaj of Burdwan, —a document which, it may be pointed out, had not been produced in the trial Court, but was marked as *Ex Z(33) (a)* in this Court by consent of parties.

Another possible source of the story might be one or other of the pamphlets which had started appearing about this time, but the difficulty is, as Mr Chaudhuri frankly conceded, there is no evidence to connect the plaintiff with this mushroom crop of literature, and none of the statements in these pamphlets can, therefore, be used as admissions of the plaintiff. It is further not known at what exact period these publications made their appearance, whether before or after the story of the sadhu was composed. The pamphlet "*Fakir Beshe Piansi Raja*" is in fact said to have come out on the 12th June, 1921, that is to say, long after this date.

From what source, then, could the story have emanated? The question is obviously one of great importance and must be faced by the defendants. An integral part of the story was the alleged rainfall at Darjeeling on the night of the 8th May, 1909, and in the statement pointed attention was drawn to this as also to the fact that the rainfall report of the time showed that there had been no rain either on the 8th or on the 9th. Lindsay's evidence shows that he also had this "rain story" before him at quite an early stage. In one part of his cross-examination he says in fact that he had looked into the rainfall report in the Calcutta Gazette before he heard that Calvert had treated the Kumar at Darjeeling (*Vol 2, p 147, ll 25-28*), and on his own statement earlier in his evidence, it was from the "rain story" that he was convinced "from the first" that the plaintiff was not the Kumar (*ibid, p 144, ll 24-25*). It would not be unfair, therefore, to conclude that the story given to Lindsay and the story in the statement circulated with the questionnaire, when neither is traceable to the plaintiff or to anybody or anything on his side, must have had some other common origin. What could it have been? If such a story did not come from the plaintiff or his camp, is it to be supposed that the defendants were taking such pains by lucky intuition to meet a case which was still in the air and for which they themselves could suggest no surer basis than a vague or shifty rumour in which they did not believe, or an extravagant allegation in a pamphlet which had probably yet to see the light of day? Or would it not be more reasonable to hold that there was a much deeper and more certain basis, a basis in human nature itself—in "conscience which makes towards of us all"? To my mind, the suggestion of the rainfall story, first to Lindsay, and then in the statement purporting to give the story of the sadhu, is something more than a clever or accidental anticipation of a probable case. It betrays a guilty mind which knew the facts as they had

happened, and had, therefore, a clearer perception of the case which would have to be encountered. And on the materials on the record, to none else could this be ascribed but to Satyendranath Banerjee. To this source, as it strikes me, must, therefore, be traced the whole of the move which was so ingeniously set on foot at this stage to forestall the plaintiff's case in anticipation.

ITS REAL OBJECT

This takes us to the other question, what was the real meaning and purpose of this remarkable document? Mr Chaudhuri stoutly repudiated the view expressed by the learned judge that it was meant for the information of the witnesses (*Vol 18, p 318, l 2*). But then the only other hypothesis must be that it was intended as a guide to the person who was to interrogate the witnesses, which means, in other words, that it was to be a basis of leading questions to be put to them, and not to elicit facts which the witnesses were in a position to state from their recollection unaided by informative suggestions. When the first batch of witnesses were examined at Darjeeling, Satyendranath Banerjee and Rai Bahadur Sasanka Coomarr Ghose were both there. Is it to be supposed that being present on the spot they might be expected to have supplied all necessary instructions to the interrogating authority, but that in their absence a memorandum was considered both useful and necessary?

Reading the note about the story of the sadhu with the questionnaire, one cannot be left in any doubt as to the nature of the statements which the witnesses were expected to give. It is not difficult to see that the main anxiety on the defendants' side must have been to wipe out an evening cremation, for, if this was displaced, it would inevitably have negatived the whole of the plaintiff's case as far as it was possible to anticipate it at that stage. An evening procession would, of course, be automatically disproved, if death took place at midnight. That was in fact the hour already mentioned in Calvert's death certificate, and a confirmation of this from other sources would obviously be of great value. Midnight as the hour of death at a place like Darjeeling would also almost involuntarily lead the memory after a lapse of so many years to a cremation on the following morning, and thus, again, would naturally be supposed to be a complete settler of the plaintiff's case at a time when it was not yet known that the plaintiff would admit a morning cremation. Then, if a few descriptive details were forthcoming to fix the identity of the body which was taken out for cremation as that of the second Kumar, it would doubtless advance the case still further, and would do so almost to the point of conviction, if these details happened to correspond to those mentioned in the insurance affidavits of cremation—"fair complexion", "stout built", "healthy-looking", "hair rather brownish" (*Ex 29, Vol 1, p 182 and Ex 269, Vol 1, p 188*). The absence of rain on the 8th or the 9th May, as proved by the "rainfall report of the time", would, of course, be an absolute clincher.

In my view it is impossible in these circumstances to miss the significance of this "story of the sadhu" which was thus circulated on purpose along with the questionnaire with the imprimatur of Rai Bahadur Sasanka Coomarr Ghose.

R C DATTA'S QUESTIONNAIRE

A further set of questions, differing in some respects from this questionnaire, appears to have been framed later on by Romesh Chandra

Datta, D W 435, the Deputy Magistrate, who, as already stated, had started recording statements at Dacca under Lindsay's order on and from the 26th May, 1921. The witness cannot give the exact date on which he prepared these interrogatories, but says that to the best of his recollection he did so after he had already recorded a number of statements at a time when he had not been supplied with any questionnaire and when he could, therefore, only ask the witnesses to state what they knew. In framing these questions the witness admits he had consulted the Government Pleader Rai Bahadur Sasanka Coomar Ghose (*Vol 17, pp 411-413*). A list of the questions may be seen as an annexure to a letter from Lindsay to Lethbridge dated the 22nd June, 1921 (*Ex 445, Vol II, p 246*), and it would not be wholly unprofitable to compare them with the other set of questions.

FURTHER RECORDING OF STATEMENTS

(1) DR PRAN KRISHNA ACHARYYA

The process of obtaining statements of witnesses continued after this for quite a long time, and there can hardly be any doubt that the names were supplied mostly by Satyendranath Banerjee or Rai Bahadur Sasanka Coomar Ghose (*Vol 16, p 460, ll 25-30*). It is significant, however, that no statement was taken either from Satyendranath Banerjee, or so far as one can see, from Bibhabati Devi. There is one letter from Lindsay to Lethbridge dated the 10th June, 1921 which may be referred to in this connection (*Ex 439, Vol II, p 241*). Lindsay mentions in it the names of four persons including Dr Pran Krishna Acharyya, who were at Darjeeling at the time of the second Kumar's supposed death and living close to the Kumar's house "Step Aside", and he asks that the statements of these gentlemen may be recorded "about the events at the time of death and funeral procession of the second Kumar so far as they knew", and it is added that "they should be specially asked if there was any rain on the night of his death". Lethbridge thereupon makes a note that these persons should be asked to call at his office on Friday, the 17th June. A few days later, namely, on the 27th June following, Lindsay, however, informs Lethbridge that the Government Pleader has seen the gentlemen referred to in his D O of the 10th instant, and "so there is no necessity to trouble them further" (*Ex 440(a), Vol II, at p 248 top*). It would appear, therefore, that Rai Bahadur Sasanka Coomar Ghose had seen Dr Pran Krishna Acharyya. All the same, we find Lindsay addressing a questionnaire on the 13th August, 1921 direct to Dr Pran Krishna Acharyya who was then staying at Mussoori at the house of H H the Maharaja of Nabha (*Ex 2(335), Vol II, p 258*). Lindsay apparently did not venture to send him the "story of the sadhu", and his answers are naturally to the point, and not embellished with such details as are supposed to have been "volunteered" by witnesses who had, directly or indirectly, the benefit of the story, or who had been examined at Darjeeling during the stay of Satyendranath Banerjee and Rai Bahadur Sasanka Coomar Ghose. Dr Acharyya's answers will require special consideration later on in connection with the Darjeeling chapter, along with the evidence which he afterwards gave on commission on behalf of the plaintiff, the doctor being in fact the very first witness to be examined in the case. For the present, it is enough merely to add that Satyendranath Banerjee did not even know the name of Dr Acharyya at the time he was in Darjeeling in 1909 in fact he did not know any of his neighbours there (*Vol 16, p 479, l 28 and l 24*).

(2) CALVERT

Lindsay also appears to have sent a questionnaire to Calvert in England at a later stage, which Lindsay of course did not remember when he was asked about it. He did not remember either if he had got a reply from Calvert (*Vol 2, p 147, ll 23-24 and p 148, ll 31-34*). Lindsay's letter to Calvert is not forthcoming, but Calvert's reply which is dated the 3rd August, 1921 is now on record (*Ex Z(127), Vol II, p 350*). It is a document on which the plaintiff, as will be seen hereafter, places considerable reliance as lending support to an important part of his case touching the alleged death of the second Kumar. The plaintiff appears to have called for the correspondence by a petition filed in court on the 3rd August, 1931, before the commencement of the commission evidence in London (*Vol 2, pp 122-123*), and renewed his demand for its production during Calvert's cross-examination there, but the letter was not produced, learned counsel for the defendants stating, apparently on wrong instructions, that the document had never been called for (*ibid, p 208, ll 6-10*). Calvert admitted that he had asked for copy of the correspondence to be sent to him to refresh his memory, and a copy of this particular letter to Lindsay had in fact been shown to him a few weeks before his examination commenced, (*ibid, p 206, l 26—p 207, l 2, and p 207, ll 15-18*). Lindsay had likewise been shown a copy (*ibid, p 151, ll 26-27*). Even Satyendranath Banerjee had been told about the contents of this letter before the defendants' lawyers went to England, and he considered it to be an "important communication" (*Vol 16, p 493, ll 5-8*). All the same, the original document, as stated, was not forthcoming at this stage, and plaintiff's lawyer was obliged to cross-examine both the witnesses in London on the strength of a "brief" copy which was supplied to him by learned counsel for the defendants (*Vol 2, p 208, ll 11-12, and p 151, ll 26-27*). The plaintiff suggests, and not without reason, that the letter was deliberately suppressed during Calvert's examination-in-chief (*Vol 16, p 493, ll 12-14*). It was actually produced at a much later stage before a Commissioner through a formal witness Nalini Mohan Basu on the 14th October, 1932 (*Vol 2, p 489, ll 28-32*), and afterwards admitted in evidence on the 20th February, 1935. It is doubtful if the document would have ever seen the light of day, had it not been for a suggestion, unfounded as it was, made to Lindsay in cross-examination that there were certain significant words at the end of the letter which had been deleted in the copy shown to Calvert (*Vol 2, p 168, ll 1-21*). It is needless to add that in the interrogatories sent to Lindsay or to Calvert, the defendants had studiously omitted to give any indication of the existence of such a letter, though they had taken good care to acquaint the witnesses with the contents of the document before they came to give their evidence, and though it is worth while to mention there was a specific question for both witnesses regarding a letter of condolence which Calvert is supposed to have written to Bala Kumar on the 10th May, 1909 from Darjeeling (*Ex Z(205), Vol I, p 419*).

(3) HARAN CHANDRA CHAKLADAR

Another person who was approached by Lindsay for a statement about this time was one Haran Chandra Chakladar, a lecturer of the Calcutta University, who says that he was at Darjeeling in May 1909, staying at the Lewis Jubilee Sanitarium which was and is a well-known residential hotel at this hill-station largely patronised by Indians. He is an important witness on behalf of the defendants (*Vol 1, pp 376-400*), who is said to have accompanied the funeral procession from "Step Aside" to the cremation ground on the

morning of the 9th May and witnessed the actual cremation, recognising the face, as the body lay on the funeral pyre, to be that of the Kumar. He is also supposed to have been a speaker at a condolence meeting held in the Lewis Jubilee Sanitarium on the 16th May, 1909, in memory of the deceased Kumar, though it may be pointed out,—not that the fact is conclusive,—that he is not mentioned in a list which the defendants have filed giving the names of persons who attended the meeting (*Ex Z (118), Vol I, p 462*) Lindsay's evidence is that he had sent a questionnaire to Chakladar in the usual course in 1921, as he had done to other persons who were known to have been present in Darjeeling at the material time, but as Chakladar did not send an answer, he thought it fit to go down to Calcutta to interview him at his house and obtain his statement. The reason which prompted him to take this unusual step was that he thought that "Chakladar was a sort of person whose evidence would be believed throughout Bengal whatever he said" (*Vol 2, p 140, ll 17-21*) As to how Lindsay got the name of this witness or came to know so much about him at this stage, is a point which, like so many others in the case, the defendants have chosen to leave in complete obscurity. Satyendranath Banerjee had not even heard the name of Chakladar before the day Lindsay went down to take his statement, when "at Lindsay's request", he says, he accompanied him to Chakladar's house at Shahnagore in Kalighat, a suburb of Calcutta (*Vol 16, p 540, ll 13-14, l 19, and p 544, ll 22-27*) I may state at once I do not believe a word of this evidence which is only typical of the many palpable falsehoods which Satyendra has uttered in Court. Chakladar was asked why he had not given a statement to Lindsay before the interview, and his evidence on the point is directly contradictory to that of Lindsay. Chakladar said that nobody had asked him for any statement either personally or by letter, and there was, therefore, "no occasion of giving any statement before the interview" (*Vol 1, p 379, ll 6-7, and p 395, ll 29-33*) In his record of the interview, however, Lindsay states — "Professor Chakladar did not wish to be called in Court, so he had not given a written statement before" (*Ex Z (359), Vol II, p 266, ll 13-14*) Chakladar attempts to explain that all he did was to object to making a "formal" statement before Lindsay at the interview, as, to quote his own words, "he did not like then to be bound down by that statement" (*Vol 1, p 380, ll 18-19 and l 25*), but he is hardly supported by Lindsay who does not remember Chakladar having made any objection to him (*Vol 2, p 155, ll 26-27*) Lindsay admits that he did not record Chakladar's statement in his presence, but made the memorandum at the Grand Hotel, probably an hour or two after the interview, which was on the 16th September, 1921 (*ibid, p 155, ll 27-28, and p 199, ll 14-15*) It is not disputed that Satyendranath Banerjee was present at the interview, and his name is actually mentioned by Lindsay in the memorandum—though Lindsay was surprised to find his name in it when the document was shown to him in cross-examination (*ibid, p 155, ll 29-30*) The note in which this fact is recorded is rather significant — "Babu Satyendra Banerjee was with me when our talk took place, but he personally did not know the way to the house" (*Vol II, p 266, ll 14-16*) It is obvious that this little detail that Satyendra did not know the way to Chakladar's house must have been added at the instance of Satyendra himself, and it requires no acuteness to see the purpose behind it. Satyendra also in his evidence did not forget to stress the point. In cross-examination he stated that he did not direct Lindsay to Chakladar's house, he did not know the house (*Vol 16, p 540, ll 14-15*), but in re-examination, this is how he developed the story —

"I was first asked by Mr Lindsay if I knew one Haran Chakladar, a Professor, who lived in Shahnagore. At that time I had no idea of

Shahmagore, but said my driver might know it. He asked me if it would be possible for me to take him there. Then I and Mr Lindsay went together in the same car to Shahmagore, and by questioning people we came to the house of Mr Chakladar" (*ibid*, p 544, ll 22-27)

Chakladar's idea, however, was that Lindsay might have taken Satyendra with him to point out the house to him (*Vol 1*, p 381, ll 13-14)

Chakladar's statement as recorded by Lindsay and the evidence he subsequently gave on behalf of the defendants will all have to be considered fully hereafter. Suffice it to say here that I refuse to believe that Satyendranath Banerjee was as innocent in the matter of getting this statement from Chakladar as he pretends to be. I have no manner of doubt that he was the person who was instrumental in taking Lindsay to Chakladar's house, and his anxiety to deny this obvious fact, as shown not only in his evidence before the Court but in the note which he caused to be made in Lindsay's memorandum, carries its own significance. Satyendra says that it was "not by accident" that he happened to be present at the interview; he had gone to see Lindsay at the Grand Hotel,—not, however, at Lindsay's request, as he is careful to add, but only to pay a ceremonial call, though "very likely" Lindsay did not know him before, and "very likely" that was the first time he met him (*Vol 16*, p 540, ll 12-13 and ll 22-25). One wonders, if Lindsay was a stranger to him or he a stranger to Lindsay, why he should keep himself so well informed about Lindsay's movements as not to miss the date of his arrival in Calcutta, or even the particular hotel where he would be putting up, though Calcutta, as Lindsay admits, was outside his jurisdiction (*Vol 2*, p 140, l 17). Lindsay, however, "thinks" that when he was in Calcutta to take Chakladar's statement, his wife had tea with Bibhabati Devi at Satyendranath Banerjee's house in Lansdowne Road (*ibid*, p 155, ll 4-7), a fact, which, if true, may be left to speak for itself. Satyendra admits that Lindsay and his wife once called at his house, but he does not of course remember in what connection Lindsay had come to Calcutta on that occasion (*Vol 16*, p 488, ll 22-24).

VISIT OF BAWA DHARAM DAS NAGA TO DACCA

Another interesting episode that happened in the course of the enquiry which was proceeding at this time may be now referred to. It relates to plaintiff's Guru Bawa Dharam Das, whose name was tattooed on the plaintiff's arm in an Urdu inscription reading "*Bawa Dharam Das da chela naga*", an inscription which Mr Chaudhuri would interpret as meaning "a chela (disciple) of Bawa Dharam Das and a Naga" (that is, a full-fledged sannyasi), but which, as the words stand, might well be taken to mean only "a *chela-naga* (that is, a novice-Naga) of Bawa Dharam Das", and this would in fact appear to be the meaning ascribed to it by one of defendants' own witnesses, D W 329, Iqbal Sing (*Vol 16*, p 98, ll 1-3, and p 101, ll 14-17), and so it is also understood by P W 939 Ram Ratan Chibba (*Vol 10*, p 375, ll 24-30 and p 377, ll 12-16).

It is admitted by the defendants, in fact it appears from their own documents, that this Guru did come to Dacca at the instance of the plaintiff on the 26th August, 1921. See Lindsay's letter of the 28th August, 1921, to French, the then Member of the Board of Revenue, in which he writes that "Dharam Das the Guru of the Bhowal sannyasi arrived in Dacca on Friday afternoon (26th August) and has been put up in great pomp by the party of Ananda Roy along with the sannyasi" (*Ex Z(352)*, *Vol II*, p 341).

Lindsay adds, though on what basis, is not known, that "evidently he has been bought over by them, as this Guru is the same person as was examined by the police in the Punjab" The report of the Punjab enquiry, as stated before, had already arrived, and a copy of it had been forwarded by Needham to Lindsay, and then by Lindsay to the Board of Revenue, in the first week of July 1921 (*Ex 388, Vol II, p 332*) The investigating officers were said to have traced out Dharam Das at a village called Chhota Sansara, twenty miles from Amritsar, and got a statement from him recorded in the presence of an Honorary Magistrate named Lt S Raghunbir Singh, identifying a photo supposed to be that of the plaintiff which was shown to him, as that of his chela Sunderdas (*Ex Z (228), Vol II, p 327*) On the 9th August following, Lindsay was actually writing to Emerson, Commissioner of the Dacca Division (*Ex 435, Vol II, p 336*), conveying a suggestion made to him by the Maharajadhiraj of Burdwan that endeavour should be made to bring Dharam Das to Dacca and thereby "expose" the plaintiff "in a way that would convince the general public", and asking for instructions from the Board of Revenue on the subject He stated that there was "of course a danger that the other party might get hold of the man and buy him over, as it would always be easy for him to deny the recognition of a photograph" The Board's reply was conveyed in a letter of the 18th August, 1921 to the Commissioner (*Ex Z(353), Vol II, p 339*), and was to the effect that it would be inadvisable to bring Dharam Das to Dacca until and unless the plaintiff instituted a suit in the civil court What led the Board of Revenue to form this opinion, notwithstanding that the Maharajadhiraj of Burdwan who was Member of the Governor's Executive Council having control over the Board, had advised to the contrary, it is difficult to conjecture, and it would not perhaps be right to think that it was due to a fear that the visit of the Guru, instead of exposing the plaintiff, might expose the character of the statement that had been obtained from him before Lt Raghunbir Singh

This did not, however, deter Mr Chandhuri from making the suggestion, without of course any evidence in support of it, that the report of the Punjab enquiry, which it is needless to add was a confidential proceeding, somehow came to be known to the plaintiff and his party, and that thereupon they contrived on a false pretext to bring down the Guru to Dacca in order to get him if they could to nullify the effect of his statement to the Police there It is a suggestion for which not only, as I have said, was there no foundation in the evidence, but which was not even put to the plaintiff or to any of his witnesses

In his examination-in-chief the plaintiff stated that his Guru came to Dacca and stayed with him at his house for 2 or 3 days and then left for fear of the police (*Vol 4, p 109, ll 3-6*) In cross-examination not a single question was put to him as to whether he had previously heard about the Punjab enquiry, or whether it was this or any other reason that led him to send for his Guru all that he was asked was if his Guru did or did not tell him at Dacca about having made a different statement in the Punjab regarding the plaintiff's identity, and his attention was specifically drawn to paragraph 23 of his memorial to the Board of Revenue (*Ex J, Vol III, p 92 at p 96*) This is what is stated in this paragraph —

"That when the announcement made by the Guru became known, someone connected with the enemies of your memorialist threatened the sadhin with criminal prosecution on the ground that he had given

a different story to some police officers in the Punjab as regards your memorialist's identity",

and it is added—

"An enquiry as to what led the sadhu to make such a statement would have shown the hands of the intriguers"

"It is difficult to see how this may be taken as proving that the plaintiff had knowledge of this supposed statement of the Guru before the Guru arrived at Dacca, or that the Guru told the plaintiff about it at Dacca. All that is stated here is that the Guru was threatened with criminal prosecution by someone in the enemy's camp, and the ground on which he was so threatened was alleged to be that he had made a statement in the Punjab contrary to what he was now making in respect of the plaintiff's identity. If, as Mr Chaudhuri suggests, this account in the memorial is to be treated as an admission of the plaintiff, it must be taken as a whole and must involve an acceptance of the position which is clearly indicated that the Guru did recognise and acknowledge the plaintiff at Dacca, but this is a case directly contrary to Mr Chaudhuri's own case as made through a witness, to be referred to presently, D W 327, whom he sprang upon the Court at a later stage as the plaintiff's Guru. There is in my view no real contradiction between the statement in the memorial and the answer which the plaintiff gave to Mr Chaudhuri in the witness box that he did not know if Dharam Das had made a different statement to the police in the Punjab about his identity (*Vol 4, p 166, ll 1-21*)

Jyotirmoyee Devi's evidence may also be referred to. She says that she had sent out people to bring down Dharam Das, and that he came and stayed at her house, where plaintiff was also staying, but left after 3, 4 or 5 days for fear of the Magistrate and the Police. During his stay Dharam Das gave her an account of the plaintiff "from the beginning to the end, when they came in touch and when they parted" (*Vol 8, p 309, ll 16-23, and ll 29-37*). All that Mr Chaudhuri elicited in cross-examination was that she did not know what reasons Dharam Das had of being afraid of the police. She heard that he had received a letter from the Magistrate, though she could not say whether it came on the day after his arrival. She had no necessity to find if Dharam Das was a Behari or a Madrassi. Not a word was put to Jyotirmoyee Devi, any more than it had been put to the plaintiff, to ask if the witness had heard about the Punjab enquiry, much less about the result of it.

To none of the plaintiff's witnesses was it in fact suggested that Dharam Das had been brought down to Dacca on the false pretext of founding a "Math", which is the definite case which Mr Chaudhuri was instructed to make through the mouth of the witness, already referred to, D W 327, a man calling himself "Bawa Dharam Das", whom the defendants put into the box as the plaintiff's Guru (*Vol 16, p 52, ll 31-32*), but who, according to the plaintiff, and as found by the learned trial judge, was an impostor who had come to personate the Guru (*Vol 18, p 406, ll 10-11*).

Lindsay states in his evidence that he did send a letter to Dharam Das, and offered to go and see him anywhere in Dacca convenient to him, but never got a reply and never saw Dharam Das (*Vol 2, p 140, ll 22-30*). Writing to French on the 28th August, 1921 (*Ex Z(352), Vol II, p 341*), he says nothing about sending a letter, but states that he is "thinking" of going down to interview Dharam Das when Quarry returned from tour, as Quarry knew the up-country language better than he, Quarry being expected back the next day. On the 2nd September following, however, one finds him

writing to Lethbridge to say —“The Guru of *sannyasi* left after a stay of two days. He was too ill (! !) to come to see me. He has made no proper statement to anybody” (*Ex 441, Vol II, p 263, ll 1-2*). If, as was Mr Chaudhuri's case later through his witness Bawa Dharam Das, the Guru refused to make a false statement in favour of the plaintiff, because of his previous statement in the Punjab, one fails to see why he should have refused to see Lindsay or any one on the side of the defendants. It is not the statement of this witness, as elicited by Mr Chaudhuri, that after his refusal to oblige the plaintiff and his friends, any sort of pressure was put on him not to go to Lindsay, or they made it in any way impossible for him to see Lindsay. It is needless to add that such a suggestion had not been put by Mr Chaudhuri to the plaintiff or to Jyotirmoyee Devi or to any other witness on the plaintiff's side.

It beats me, therefore, how after this Mr Chaudhuri could solemnly invite the court to hold that the people who had taken the trouble to bring down Dharam Das to Dacca had to send him away, not because the local authorities made the place too hot for him, if one might say so, but because he refused to make a statement in support of their case contrary to his previous statement in the Punjab.

As to the value of that previous statement, it will appear fully from the judgment of the trial court where the Punjab enquiry is dealt with,—which is quite an interesting chapter by itself and throws a characteristic light on the conduct of the defendants in the case —

Mr Chaudhuri made a great point of the fact that Jyotirmoyee Devi did not even ascertain from the Guru whether he was a Behari or a Madras (*Vol 8, p 369, ll 32-33*), and characterised this statement which the witness made to him in cross-examination as a “most extraordinary falsehood”. But the fact remains, on defendants' own showing, that the real Guru did come to Dacca at this stage and put up at the house of the plaintiff and Jyotirmoyee Devi, and no purposeless lies need have been told to support the admitted fact.

INTRODUCTION OF A NEW GURU—AGHORI BABA

Mr Chaudhuri referred also to what he described as a “stranger development later on”, and it was this that when the plaintiff found that the Guru Dharam Das was no longer available as a witness on his side, another sadhu of the name of “Aghori Baba” was sought to be introduced shortly after in his place in the Defamation Case of Dr Ashutosh Das Gupta (already referred to) as the sadhu who is supposed to have rescued the plaintiff at Darjeeling and taken him away from there. It was said that the plaintiff stuck to this story of Aghori Baba rather than of Dharam Das in his memorial of the 8th December, 1926, to the Board of Revenue (*Ex J, Vol III, p 92*), and in this connection Mr Chaudhuri called attention to extracts from the depositions of two witnesses Jogesh Chandra Rai and Rabindranath Sanyal in the Defamation Case, which were annexed to that document (*ibid, pp 117-118*). Both these witnesses state that ten or twelve days after the 10th Mar, 1909, they saw the second Kumar of Bhowal in a *sannyasi's* garb and with head shaven, in a railway train leaving Darjeeling in the company of a *sannyasi* whom one of the witnesses, Jogesh Chandra Rai, knew and recognised as Aghori Baba. Referring to these statements, the plaintiff points out in paragraph 27 of the memorial what is a fact, namely, that these witnesses deposed on oath that they had seen the Kumar leaving Darjeeling by train with a *sannyasi* shortly after his alleged death.

Mr Chaudhuri contends, relying on what is stated in paragraph 30, that these depositions must be taken as admissions of the plaintiff, and refers to *Taylor on Evidence* (11th Edition), Vol I, sec 763, in support of his contention. Apart from the question as to whether learned counsel is or is not correct in his proposition of law, it is enough to point out that in paragraph 23 of the same memorial the plaintiff has definitely given the name of his Guru Dharam Das Naga as the person who was brought to Dacca at the instance of his well-wishers. How after this it could be said that the plaintiff had jettisoned his Guru Dharam Das Naga and picked up a substitute in Aghori Baba, is more than I can understand. If the plaintiff was really making the story of Aghori Baba at that stage, because Dharam Das had failed him, how is it that he still clung to Dharam Das expressly in the body of the memorial, and later at the trial, though at the trial he must have realised he could not procure or produce this man to give evidence in his favour? Mr Chaudhuri's suggestion, if I may say so with respect, appears to me to be too absurd to be taken any serious notice of.

The fact remains, as I have said, that Dharam Das Naga, the real Guru of the plaintiff, was at Dacca in September, 1921, and it is a further fact appearing in defendants' own evidence that the plaintiff had almost from the very beginning since the day of "*Atma-parichaya*" been giving out the name of his Guru as Dharam Das and declaring that he would make a full disclosure when the Guru arrived. On Landsay's own evidence, as already pointed out, the plaintiff had given the name of his Guru at the interview of the 29th May, 1921 (Vol 2, p 140, ll 10-12, p 147, l 20). As to why, when the Guru arrived, no public disclosure was or could be made by him regarding the plaintiff, the explanation has been given on behalf of the plaintiff, and there appears to be no reason for not accepting it as sufficient.

FURTHER ACTION BY LINDSAY

A passing reference may now be made to some further action which was taken by the authorities after the issue of Landsay's "impostor notice" (Ex 432, Vol II, p 277). On the 28th May, 1921, as already stated, Landsay had issued a warning notice to all officers of the Bhowal Court of Wards Estate not to acknowledge the *sadhu* as the second Kumar, or promote belief in his identity. On the 13th June, 1921, he issued a second notice in the following terms —

"The Board of Revenue has found that the sannyasi who says he is the second Kumar is an impostor. All the servants of the Bhowal Court of Wards are hereby informed that if they are found directly or indirectly espousing the cause of the sannyasi, they will be liable to summary dismissal" (Ex 207, Vol II, p 278).

This was followed by further orders and circulars issued by Landsay or by other Court of Wards officials from time to time, threatening or directing action to be taken against persons who were supposed to be "acting against the Estate in the matter of the *sadhu*", to which it is not necessary to make a detailed reference.

It may be stated in passing that the Board of Revenue was reported about this time to be contemplating a change in the terms of the impostor notice by deleting the word "impostor" from it, and on the 2nd July, 1921, Needham was writing to Landsay seriously to consider if any such action should be taken in view of the fact that the real identity of the *sadhu* was about to be ascertained as a result of the Punjab enquiry (Ex 388, Vol II, p 332). Apparently the proposal, if any, was thereupon dropped. On the 5th July, 1921, Landsay in fact issued a circular order to Needham directing

that all officers of the Court of Wards were to be told that the rumour to the effect that the Hon'ble Board had withdrawn the word "impostor" from the notice was a lie (*Ex 218, Vol II, p 286*)

DOCUMENTS CALLED FOR BY BARA RANI

While the collection of statements from witnesses was proceeding, as already indicated, Lindsay took another step in the way of procuring contemporaneous documentary evidence which was expected to throw light on the question of the second Kumar's death. On the 27th October, 1921, he wrote to the Bara Rani Sarajubala Devi in Calcutta, calling for "the originals of all the letters and telegrams in connection with the illness, death and cremation of the late second Kumar of Bhowal, which had passed between her husband and the persons who had gone with the second Kumar to Darjeeling" (*Ex 55, Vol II, p 355*). Sarajubala has stated in her evidence that she thereupon sent all the papers to Lindsay after retaining copies thereof, and she filed all the copies she had before the Commissioner who took her evidence (*Vol 3, p 72, ll 5-10 and ll 32-33*). She admits that a telegram had come to her husband at the time from Darjeeling announcing the death of the second Kumar, but this telegram was not among the papers she filed.

TELEGRAM OF DEATH

There can be no question that this telegram was a material document, which, if produced, might have furnished almost conclusive proof of the hour of death—a crucial question in the case, as we shall see, but unfortunately it was not forthcoming, and there was serious controversy between the parties at the trial as to whether the document had been kept back by Sarajubala, or was being withheld by the defendants who had it in their custody. The learned trial judge, it may be stated, has definitely found in favour of the plaintiff on the point (*Vol 18, pp 357-359*), and it is just as well to state some of the relevant facts at this stage.

It appears that on the 5th December, 1916, Sarajubala who was then in Calcutta wrote to Needham (*Ex 370, Vol II, p 73*) that her husband's papers which were lying in a box or two in the Private Secretary's office at Jaidebpur might be sent to her, as they were required for the purposes of certain allocation proceedings which were then going on, these being proceedings which had been directed by the Board of Revenue to adjust accounts as between the three Rani's so as to debit to each the personal expenses of her husband (*See Vol 15, p 281, and judgment, Vol 18, p 268 top*). On receipt of this letter Needham asked the Private Secretary Jogendranath Banerjee to put up a list of the papers. On the 10th December following Jogendranath Banerjee wrote to Sarajubala, apologising for the delay in complying with her request and promising to send her as early as possible all the "letters and other things whatever" which were with him (*Ex 372, Vol II, p 174*). The documents were actually sent to her by Needham with a covering letter, dated the 18th April, 1917 (*Ex 65, Vol II, p 74*), in which he stated that he was keeping a list of the papers in his office and forwarding a copy of the list to her. It is admitted that all the letters and telegrams which Sarajubala sent to Lindsay in pursuance of his requisition of the 27th October, 1921, and copies of which she filed before the Commissioner, were among the papers she had thus received from Needham.

It is the plaintiff's case that the telegram of death had not come to Sarajubala with these papers. If, as the defendants suggest on the other

hand, it had, in fact, been sent to her at this time, it would doubtless have been included in the list which Needham retained. Thus list, the defendants did not produce in court. Sarajubala had, on the other hand, produced before the Commissioner her copy of the list as sent to her by Needham, and in reply to a challenge by Mr Chaudhuri in this court, this copy was readily produced for our inspection on behalf of the plaintiff. There is no mention of a telegram of death in the list. It would not be fair, however, to draw any inference adverse to the defendants from this fact, having regard to the incomplete specification given in the list which makes it difficult to trace out any particular documents mentioned therein.

What, then, do the probabilities suggest? Supposing Sarajubala had received the telegram from Needham in 1917, would there be any reason for her to suppress it from Lindsay when he asked for it? Sarajubala's evidence is that she became convinced of the plaintiff's identity as the second Kumar from the day she saw him at her house in Calcutta, which was somewhere in July or August, 1924, but the definite case which the defendants put to her was that up to 1335 B S or 1928, she had been consistently representing to the Board of Revenue that the second Kumar was dead and that it was in that year that her attitude changed for the first time (*Vol 3, p 83, ll 32-35 and p 90, ll 15-18*). Her attention was in fact specifically called to a number of letters she had written to the Board to that effect, ending with a letter of the 23rd July, 1928 (*Ex Z(305), Vol II, p 150*), (*Vol 3, p 90*). If, then, the defendants are right and Sarajubala was really treating the plaintiff as an impostor till 1928, it is difficult to see what motive she could have in 1921, for withholding from Lindsay this material evidence of the second Kumar's death.

There is another important point to be considered in this connection. Lindsay's requisition of the 27th October, 1921 (*Ex 55, Vol II, p 355*) shows that he wanted Sarajubala to send him *all* letters and telegrams in connection not merely with the second Kumar's "illness", but with his "death" and "cremation" as well. If, then, in sending him the papers, Sarajubala was purposely keeping back the intimation of death received from Darjeeling, is it likely that Lindsay would have kept quiet over the matter and not made a further enquiry about it from her, or is it not a more reasonable inference that the telegram of death was already in the Court of Wards office at Dacca and Lindsay was, therefore, quite satisfied with whatever papers he got from the lady? The fact that Lindsay did not make a further requisition for such a material document is significant, and can only mean either that it was already with him, or that he got it now from Sarajubala along with other papers and in either case, the document will have been shown to be in the possession of the defendants.

The plaintiff, in fact, elicited a very important admission in respect of the telegram of death from a witness on behalf of the defendants, Sarada Prosonna Ghose (*Vol 2, pp 272-293*), who was examined on commission in February, 1932. This gentleman was a Deputy Magistrate who had heard the Defamation Case in 1922, in which the question of the illness and alleged death of the second Kumar had been raised (*Vol 18, p 177*), and who was admittedly in charge of the Court of Wards department at Dacca from 1923 to 1925. As such, he says, he had gone through many confidential papers which confirmed him in his impression about the death of the second Kumar at Darjeeling (*Vol 2, p 281, ll 24-27*), and he specifically made a statement regarding the telegram of death in these terms —

"I as Wards Deputy Collector went through the telegram about the death of the second Kumar coming to the eldest Kumar from Darjeeling" (*Vol. 2, p 283, ll 34-35*)

This, if true, would conclusively show that the telegram was in the Court of Wards office at Dacca between 1923 and 1925, and all pretence that the document had been suppressed by Sarajubala must necessarily disappear. Mr Chaudhuri, however, made an ingenious attempt to get over the effect of this evidence. Sarada Prosonna Ghose had given his deposition in Bengali, and Mr Chaudhuri asked us to interpret his statement to mean merely that the witness had read about the fact of a telegram having come to Bara Kumar from Darjeeling announcing the death of the second Kumar, and not that he had read the telegram itself. I may give here the original words in Bengali in his deposition —

“দার্জিলিং থেকে বড় কুমারের কাছে যে মেজো কুমারের মৃত্যু সংবাদে telegram এসেছিল তাহা আমি as Wards Deputy Collector পড়েছিলাম।”

“Darjeelung theke bara Kumarer kachhe je mejukumarer mrityu sambader telegram esechhila taha ami as Wards Deputy Collector porechhilaam”.

All that I can say is that, with all respect to Mr Chaudhuri, I am unable to accept this forced interpretation of his. To any Bengalee who reads these words as they stand, the only meaning they would convey is that the witness had read the telegram itself and not read about it. If any one speaking in Bengali wanted to say that he had merely “read” about the fact of receipt of a telegram, he would undoubtedly have expressed himself quite differently. The word “taha” in the answer given by the witness can refer only to the telegram he had specifically mentioned, namely, the telegram conveying the news of the Mejo Kumar’s death, and not to the fact that a telegram had arrived reporting the Mejo Kumar’s death. That this was the meaning which the witness wanted to convey would be at once apparent, if this answer is read with his previous statement at p 281, ll 24-25, Vol 2, and if it is further borne in mind that the defendants do not suggest that there were any confidential documents apart from the telegram itself from which the fact of such a telegram having come from Darjeeling would be apparent.

It appears that during the examination of DW 92, Phani Bhusan Banerjee, on the 24th June, 1935, learned counsel for the defendants said something in court with reference to the evidence of Sarada Prosonna Ghose on the point, which learned counsel for the plaintiff understood as amounting to a suggestion that the statement of the witness was an incorrect one. Two days later, on the 26th June, the plaintiff filed a petition in court putting on record the fact that the defendants had not at any previous stage questioned the correctness of Sarada Prosonna Ghose’s said evidence, which was stated to be to the effect that “he had seen in the office during his service as Wards Deputy Collector, Dacca, the particular telegram sent to Jadedpur from Darjeeling announcing the death of Mejo Kumar” (Vol 14, p 231). The defendants filed a petition in answer which is on the next page, and it merely states that it had always been the defendants’ case that the telegram was never in their possession and power, but that all telegrams were in the possession and power of Sarajubala Devi ever since they had been sent to her by the Court of Wards after the death of Bara Kumar. There was no suggestion that the plaintiff’s reading of Sarada Prosonna Ghose’s evidence as very clearly set out in the plaintiff’s petition was not correct. From an order which the learned trial judge recorded in the matter on the 4th July, 1935 (Order No 1079, Vol 1, pp 80-82), it will also be seen that Mr Chaudhuri’s statement to court on the day the plaintiff’s petition was filed was merely that Sarada Prosonna Ghose’s evidence was

not correct, not that the evidence was to be construed in a sense different from what the plaintiff was suggesting. The learned judge further records in this order that he does not remember to have heard before that date the suggestion that Sarajubala Devi was keeping back the telegram, and notes in fact that Mr Chaudhuri stated that he was not in a position to make a definite statement of that kind. It is hardly necessary after this to labour the point any further, except to emphasize that Sarada Prosonna Ghose was not re-examined with reference to the answer he had given in cross-examination, as undoubtedly he would have been, if there was any real ambiguity in his statement as is now suggested.

On a consideration of all the materials on the record, it seems to me to be impossible, therefore, to come to any other conclusion on the subject than that of the learned trial judge, who had no doubt whatever that the telegram was in the possession of the defendants and had been purposely withheld by them (*Vol 18, pp 357-359*)

DIARY OF SATYENDRANATH BANERJEE

Before proceeding to a consideration of the Darjeeling evidence, it will perhaps be useful to call attention to an interesting document which came to be largely relied on by the plaintiff in connection not only with the Darjeeling chapter but with other parts of the case as well. It is really a defendants' document, but was produced by the plaintiff. The defendants could not, however, question its authenticity, all that they said was that it had been stolen from their custody. It is a diary of Satyendranath Banerjee for 1909, but admittedly kept for part of that year. There is no evidence or suggestion that he was in the habit of writing a diary in those days or that he ever wrote one in later years of his life, and it was for him, therefore, to explain the exceptional circumstances which led him to compose such a record for this period.

The diary which has been produced is not in a complete form. It commences from the 7th May 1909—the second day of the Kumar's illness at Darjeeling, and runs on to the 22nd November, not continuously, but with breaks. The entries in all the written pages of the book, except only three, were put to Satyendranath Banerjee in cross-examination and marked as exhibits on plaintiff's side (*Ex 399 series, Vol I, pp 306-384*). At the conclusion of Satyendra's evidence, it appears, learned counsel for the plaintiff produced and filed in court several more pages of the diary, numbering 42, of which only 3 were written and the rest blank, which he said were all that his client had in his possession. A list of the pages so filed will appear from a petition which was presented by the defendants on the following day, putting it on record that the plaintiff was purposely withholding the remaining pages which would have been material evidence in their favour, and asking that the written pages not yet exhibited (namely, those for the 18th, 19th and 28th October) might be marked as exhibits on admission. In a petition which the plaintiff filed in answer (*Vol 17, p 73*), the plaintiff stoutly denied having withheld a single sheet, and maintained, as his learned counsel had already informed the court from the beginning, that the diary had come into his possession only in a mutilated form.

A detailed examination of the various entries which are in evidence must be reserved for the present, but there are certain broad questions arising in connection with this document which may be touched upon here. The attitude which learned counsel for the defendants adopted in regard to it may be at once indicated. Mr Chaudhuri sought to rely on the diary as strong

corroborative evidence of the defendants' case regarding the second Kumar's death and cremation, seeing that the document was produced by the plaintiff, and further contended that he was entitled to ask the court to draw an adverse inference against the plaintiff from the non-production of the missing pages. He strongly repudiated the suggestion that the diary had been written with any ulterior object, or for any purpose other than Satyendra's private use, or that alternatively, Satyendra was deliberately making false entries therein. He maintained that the diary showed that Satyendra kept it for himself alone to protect his sister's interests and that it ceased as soon as this object was secured. According to his case, Satyendra started writing it on or about the 20th May, 1909 and put down from recollection the events of the preceding dates *de die in diem* as from the 7th May.

The first and foremost question obviously is as to the purpose for which the diary was written. That there was a purpose behind it, is not disputed by Satyendra himself. It is not his case that he was seized with a sudden fit of soliloquizing on paper for his own delectation. He has given an explanation, and it is important to see how far it carries conviction.

SATYENDRA'S EXPLANATION

The existence of such a diary appears to have been suggested for the first time to Bibhabati Devi in cross-examination on the 7th March, 1935, when she was asked if she could recognise her brother's handwriting and if she knew that he kept a diary (*Vol 12, p 228, ll 13-15, p 233, ll 31-39*), and the first entry, that of the 2nd October, 1909 (*marked Ex X(379) for identification, and later, as Ex 399(a), Vol I, p 361*), was put to her on the 11th March following. Satyendra, who came to give his evidence in December 1935, admitted in examination-in-chief that he kept a diary "for some matters in 1909", and gave the following reasons for his doing so. Within two or three days of his return to Jaidehpur from Darjeeling after the death of the second Kumar he came to hear of a deed of management propounded by Bara Kumar, the effect of which would have been to deprive his sister of her share of the inheritance. As neither he nor Bibhabati Devi had ever heard of such a document at any time during the second Kumar's life, this aroused his suspicion and he feared that there was a conspiracy on foot against his sister. He thereupon decided to "watch events", and he thought, "it would be better if I noted down the events as they happened from day to day as also my reflections from time to time". He actually set out writing the diary a day or two after the second Kumar's *sradh* which took place on the 18th May, 1909, that is to say, from about the 20th May, but he considered that "it would be better if he jotted down the happenings at Darjeeling as far as he remembered". He kept the diary till about the end of the year and discontinued it "when the deed of management was given a go-by and Bibhabati was restored to the full possession of her powers" (*Vol 16, p 437, l 34—p 438, l 10, and p 498, l 33—p 499, l 2*). Satyendra added that the diary had been stolen as well as his old letters and papers, and he suspected that they had been stolen by one Moumohan Bhattacharya, an employee of his and an ex-employee of the Bhowal Estate (*ibid, p 438, ll 13-16*).

There is no suggestion on the plaintiff's side that this diary came into existence after his appearance as a *sadhu* in 1921. The trend of Satyendra's cross-examination would in fact negative such a suggestion (*ibid, p 543*). It may be taken, therefore, that it was more or less a contemporaneous record. Still the question remains how far it is possible to accept Satyendra's

explanation as to what led him to start such a record. It is worth while mentioning that in his opening before us Mr Chaudhuri made the case that Satyendra took this course on a lawyer's advice, and he gave the name of the lawyer as Mr Umakali Mukherjee, a senior Vakeel of the High Court, one of whose sons had married a sister of Bibhabati. Mr Chaudhuri's learned junior, however, frankly admitted to us afterwards that there was no evidence to support this. All that appeared was that Satyendra saw Mr Umakali Mukherjee in Calcutta on his return from Jaidebpur in connection with the deed of management (*ibid*, p 432, ll 39-40, and p 436, l 9).

If, as Satyendra says, it was the situation created by the deed of management which made him think of keeping a chronicle of events "as they happened from day to day", one is tempted to ask why in that case he should have ante-dated the record from even before the second Kumar's death, supposing of course the Kumar had died. According to his evidence he heard of the deed of management within two or three days of his arrival at Jaidebpur from Darjeeling, that is to say, about the 14th or 15th May, 1909 (*Vol 16*, p 498, ll 36-37), and yet strangely enough, when he actually sets out to write the diary about the 20th May, as he says, on going back to Jaidebpur from Calcutta, he does so retrospectively with effect from the 7th May. If it be supposed that he was minded to keep a complete record by including in it the events of the preceding days, one wonders why he should not then have begun it from the date of arrival of the second Kumar at Darjeeling, or at any rate, from the date of commencement of his illness. It may be noted that the pages of the diary from the 1st to the 6th May have been produced and are all blank. One wonders, again, even as regards the days for which Satyendra was "jotting down the happenings at Darjeeling as far he remembered", why his memory should not still have been fresh enough to add a few more details in the record. Quite significantly, as it appears, this beginner in diary-writing makes an abrupt start as from the 7th May, just the day before the Kumar's "death", and that with an entry of three short sentences—"Ramendra's illness continues, pain in stomach with slight fever. No sleep last night. Wired home for fruits, etc.", and then he begins the next day straightaway at midnight with the entry—"Kumar Ramendra expired midnight",—leaving the whole of the day a perfect blank.

' Satyendra was asked in cross-examination —

"Q May I take it that it was not necessary to record the details of second Kumar's illness or the hour of his death to enable your sister to escape the effect of deed of settlement?"

His answer was —

"A I merely recorded facts"—

—only that some of the "facts" he has now found it necessary to explain away (*Vol 16*, p 499, ll 4-7). Again —

"Q The part of the diary relating to Kumar's illness and death was written for no reason?"

A As the deed was promulgated very shortly after the death, I thought I would begin from the very beginning. It was not written to combat the rumour that the Kumar's body had not been burnt.

Q I challenge you to give any other reason?

A I merely recorded the facts—no other reason."

(*ibid*, p 499, ll 16-22)

Whether he was recording facts or not remains to be seen, but certainly the reason he gives for recording them, so far at any rate as they relate to the death and cremation of the second Kumar, does not stand a moment's scrutiny

The entries of the diary as exhibited go on from day to day from the 7th to the 12th May, and in none of them is a word to be found about a deed of management or about any action on the part of Bara Kumar threatening the interest of the second Ram. The first reference to such a deed occurs in the entry next after the 12th May, marked *Ex 339(6) (Vol I, p 311)*, which as printed in the paper-book appears to be under date May 29, but which is very probably an entry of a different date

The uncertainty as regards the date of this entry, it may be noted in passing, is due to the fact that the whole of the page containing the entry of this particular date is not forthcoming. Only a mutilated fragment was produced in court, with the top portion which would show the date torn off or cut out, as is pointed out by the learned trial judge in his order *No 1335, dated 19-12-35 (Vol I, pp 99-100)*. It appears that this mutilated page later came to be pasted on one of the blank pages to prevent its going astray, and this blank page happened to be that of the 29th May. It is quite apparent, therefore, that the entry cannot be of this date. Mr Chaudhuri points out that the internal evidence of the entry furnished by the reference therein to Bibhabati's condition (mental derangement and inability to recognise persons) suggests an earlier date, but even if this be supposed to be the case, it would still leave a good deal to explain

There are several other references in the diary to the deed of management, but it will be incorrect to state that it ceased as soon as the danger arising from this source was averted. The diary shows that what has been referred to as the deed of management was an agreement said to have been executed by and between the three Kumars regarding the management of the estate in the event of the death of any of them, which provided that in such a contingency the estate should be managed by the surviving brothers and the widow of the deceased should get only a maintenance allowance of Rs 12,000 per annum. Bara Kumar is reported to have told Satyendra that the deed could not be registered, as the "Collector's man" wanted a bribe of Rs 5,000, whereas he was prepared to offer Rs 500 only (*Vide entry dated 30th May, 1909, Ex 399(7), Vol I, p 312*). It is worthy of note that neither in this entry nor in the previous one where the deed of management is first referred to, is there a word of protest recorded by Satyendra. On the next day (31st May), Bara Kumar is stated to have been willing to "settle all affairs amicably", and he in fact asks Satyendra to let him know after consulting Chhota Kumar what sort of management Satyendra desired and also how much his sister wanted. As it would be difficult for his sister to manage the estate, Bara Kumar is said to have suggested that she should give them a power of attorney and they would pay her a settled sum every year. Satyendra made a counter-proposal that the two Kumars might take a putni settlement of his sister's share, and he writes that Bara Kumar was willing to accept the proposal. From this, Satyendra notes, it was apparent that the deed of agreement was not genuine (*Ex 399(8), ibid, p 313*). On the 20th June, Bara Kumar is supposed to have sent word to Satyendra that if he so wished, the deed of agreement might be cancelled and a fresh one entered into as might be dictated by him (*Ex 399(14), ibid, p 319*). On the 21st June Satyendra receives an assurance from the Commissioner that his sister's interests will be protected,

and the Commissioner offers to ask the Court of Wards to take over her estate, if nothing could be done to have it properly managed (*Ex 399(15)*, *ibid*, p 320) The next day Satyendra sees the Collector, and the Collector not only assures him that Government will give her a good and proper Manager, but tells him that he should see to his sister's interest, "even if he was insulted for his doing so" (*Ex 399(17)*, *ibid*, p 321) On the 27th June he hears that some signatures were secured from Bibhabati by Rai Bahadur Issur Ghose, the then Government Pleader of Dacca (*Ex 399(18)*, *ibid*, p 324) On the 23rd July Satyendra gets a report from one Juan Sanker Sen who was till recently Manager of the Estate that a document had been presented before Bibhabati by Chhota Kumar for signature, which she refused to sign (*Ex 399(62)*, *ibid*, p 332), but on the 8th August he records that the report was "bogus" (*Ex 399(22)*, *ibid*, p 337) On the 20th August there is an entry that the Kumars were trying to pledge the life-policy of the second Kumar to their aunt for Rs 30,000 to pay off a debt, to which Bibhabati objected, and the Kumars had to desist (*Ex 399(24)*, *ibid*, p 343)

It is not necessary to go into further details, but reading the diary as a whole, one may say that it does perhaps disclose an attempt on the part of Satyendra to resist a deed of management propounded by Bara Kumar at some stage, but if that was the explanation for writing it, it would not account for its being continued for months afterwards. In any event, as already indicated, it would not explain the *post facto* entries from the 7th to the 12th May, which are in fact the most material entries in the case. Satyendra alone could say what his real purpose was in writing the diary, but obviously he has not chosen to do so.

One significant fact is that Satyendra does not himself now stand by all that he has recorded in this document, and particularly as regards some of the "facts" he has noted in the earlier part of it with regard to the illness, death and cremation of the second Kumar and the events following immediately thereafter.

WAS HE LYING TO HIMSELF?

This takes us to the question which was pointedly posed by Mr Chaudhuri was Satyendra lying to himself, in the diary? The answer is furnished to some extent by Satyendra himself in the evidence he has given in the case. One of the contentions which Mr Chaudhuri strongly pressed before us, was that if and in so far as the entries corroborated the defendants' present story, they should be accepted as of the highest evidentiary value, but he omitted to say what would be the result where the diary differed from the version now given.

So far as the facts connected with the second Kumar's "death" and cremation are concerned, one sees the difficulty of suggesting that Satyendra was deliberately making false entries about them for the purpose of creating evidence in his own favour. In the first place, he could not use his own statements in favour of himself, and, secondly, he was himself mentioning the names of various persons in the diary who by their evidence could at once contradict his story. It seems to be more reasonable to hold that Satyendra was writing for himself, but *not altogether without an eye to the future*. Supposing he had any suspicion in his own mind regarding the fact of the second Kumar's death, he could not of course expect that his diary would be of any use to him in case the second Kumar turned up, for, obviously he could not be certain that the second Kumar would turn up only after all evidence to negative his story had ceased to be available. It would indeed

be going too far to say that Satyendra was seeking to provide against so remote a contingency. Nor do I think it would be right to accept the suggestion which was put to Satyendra in cross-examination that he was making these particular entries for the purpose of combating the rumour that the second Kumar's body had not been cremated. An attempt to create documentary evidence in this way against such rumours or reports would be equally futile or meaningless, for, anything he might choose to put down in his private record could not obviously prevail against living testimony which he must have known would be easily procurable to prove the contrary. It is not as if Satyendra got a friend to write a diary regarding the events of these days in the way he wanted them to be recorded, so that it might at any rate with some plausibility be produced as independent evidence, but here was Satyendra himself acting as his own chronicler, who *ex hypothesi* was seeking to hide his own delinquencies. In so far, therefore, as it is suggested that in making this record Satyendra was manufacturing evidence in anticipation, I think the theory must be discarded. All the same, his action need not have been wholly purposeless: he might still be casting his eyes far ahead of the immediate present. It might well be that his object was no more than keeping a memorandum for his own use of the story he should make and have to adhere to in future, in case any questions came to be raised at any stage hereafter regarding events which he would inevitably be called upon to explain. One does not always go out of one's way to keep notes about a true story, but if a person is minded to make a false case or finds it to his interest to do so, it is often safer to reduce it to writing. The written record helps to preserve the fleeting lineaments of an imaginary picture from the constant risk of distortion through the shifting mists of human memory. All this, it may be said, is mere speculation, but what else is left when the only person who could give the real answer to the question before the court does not give it?

Satyendra was no doubt deprived of the assistance he expected to derive from the memorandum he drew up, but this was due to an accident which he could not anticipate. The result of it, of course, was that he found himself under the necessity of having to explain away many things in the course of his evidence when confronted with his own writing by the opposite party.

I find it difficult to accept the suggestion which seems to have been made by Satyendra in one part of his cross-examination that he was recording the events connected with death and cremation merely for the sake of recording them (*Vol 16, p 499, l 7 and l 22*). Such a view is in fact ruled out at once by the character of the entries themselves. No details of the illness are given 'biliary colic' of which so much is heard later in the evidence is not even hinted at: the date when the illness commenced is not mentioned and the first entry starts all at once with the statement "Ramendra's illness continues", and what is more significant, the next day's entry, as already pointed out, begins with "midnight", the supposed hour of death. One cannot help feeling that so far at any rate as these entries of the 7th, 8th and 9th May are concerned, the object was not so much to make a fair record of the days' happenings, but only to make a note of such facts as were considered important, the most important among them being obviously death at midnight, and facts which might be expected to confirm it.

DIARY ENTRIES—HOW FAR EVIDENCE FOR OR AGAINST THE PLAINTIFF

The next question which arises is as to what use the plaintiff is entitled to make of the entries in the diary. Mr Chaudhuri made the point in his

reply that these were in the nature of 'admissions', and as such, it was not open to the plaintiff to "divide" them and pick out only the items which went against the defendants. The plaintiff, it was argued, was bound to take the document as a whole, and if that was done, it was the most damaging piece of evidence against his case that could be produced. Mr Chaudhuri referred to *Phipson on Evidence* (7th Edition, p 275) in support of his contention. The answer is two-fold. In the first place, the entries are not admissions at all within the meaning of the Indian Evidence Act, ss. 18, 19 and 20. Secondly, it is well-established that distinct matters, not necessary to explain or complete an admission, although contained in the same document or statement, are not evidence in favour of the party making the admission. It is no doubt the rule that where an admission is qualified in its terms, it must ordinarily be accepted as a whole, or not taken at all as evidence against a party, but when a party makes separate and distinct allegations without any qualification, this rule does not apply. It will be seen that the particular items from the diary which were put to Satyendra and are sought to be used against the defendants were quite distinct and independent matters, not inter-related to other parts of the entries. In point of fact, the plaintiff appears to have used the diary for a double purpose, partly to contradict the witness in respect of certain matters by the writing, and partly to prove facts therein stated by admission, which undoubtedly he was entitled to do under the law.

So far as the defendants are concerned, it is difficult to see how, treating the entries as admissions, the defendants could use them in their favour. It does not also appear to be clear how far the defendants are entitled to rely on these statements as corroboration of Satyendra's testimony under s 157 of the Indian Evidence Act, seeing that they did not offer to prove them themselves, either by the production of the statements, or by giving secondary evidence of their contents on establishing their right to do so. It is not necessary, however, to discuss the point, for, even if the entries in the diary could be legitimately used for such a purpose, though proved by the other side, their corroborative value would doubtless depend upon the facts and circumstances connected therewith.

MISSING PAGES

Turning now to Mr Chaudhuri's charge regarding the missing pages of the diary, what he said was that the plaintiff had the whole book in his possession, but produced only a number of loose sheets from it, deliberately keeping back the pages which, if produced, would have gone against him. There is no direct evidence on the defendants' side that the whole of the diary was in the plaintiff's custody, but they maintain that this was admitted by Mr B C Chatterjee, counsel for the plaintiff, as early as the 11th March, 1935, when the first entry was shown to Bibhabati Devi in cross-examination, and it is further said that Mr Chatterjee offered at this stage to produce the whole book later on. The defendants made this categorical assertion in the petition, already referred to, which they filed on the 20th December, 1935 (*Vol 16, p 549*), the day after Mr Chatterjee filed in court the unexhibited pages of the diary with the statement, as he says, that these were all that his client had in his possession. The plaintiff emphatically denied having ever made a different statement through his learned counsel, or offered to produce the entire book as alleged, and made his position clear in his petition of the 6th January, 1936 (*Vol 17, p 73*), to which also reference has

been made. The defendants returned to the charge in a further petition by way of rejoinder on the 8th January following, and their whole case regarding the missing pages is fully set out therein (*ibid*, p 90). This does not, however, carry the matter beyond the statement of learned counsel on one side contradicted by that of learned counsel on the other.

The fact remains that the diary in a fragmentary condition was produced from the plaintiff's custody, not through a witness, but by his learned counsel, and it is also a fact that this was not a document of the plaintiff Satyendra who alleged that the diary had been stolen by Monmohan Bhattacharyya stated in re-examination that he had seen it last at Daeca about a fortnight before the Court of Wards took over charge of the Estate, which was in the year 1911, and it was then a bound book and intact, with no pages torn (*Vol 16, p 544, ll 29-32*). The plaintiff, as stated, has given no evidence on his side to show how he came by the diary or in what condition it came into his hands.

PRESUMPTIONS ARISING THEREFROM

In this state of things the court may only draw a presumption as to the facts under s 114 of the Indian Evidence Act. But supposing the presumption is in favour of the defendants, can it go beyond this that the plaintiff had the entire diary in his possession? This, however, will not be sufficient for their purposes. There will have to be a further presumption in the defendants' favour that the pages which were with the plaintiff, but not produced by him, were written in and not blank sheets. But are there enough materials before the court to justify its going so far?

The plaintiff has undoubtedly this fact in his favour that the diary did contain a large number of blank pages, and there is little or nothing to contradict this on the other side. Satyendra was not asked, as he might have been, if he had written the diary continuously from day to day, and he did not say that he had done so.

Apart from the entries actually exhibited, Satyendra mentioned to his counsel in re-examination only one specific item which was entered in his diary, namely, the date of his arrival at Jaidebpur after the second Kumar's *sradh* (*Vol 16, p 544, ll 32-33*). He coupled it with a further statement that "except for the Darjeeling incidents, other incidents were recorded from the time he returned to Jaidebpur after the Kumar's death" (*ibid, p 544, ll 39-41*). But this is expressed in much too vague and general terms to override the undisputed existence of blank pages in the diary. The utmost that I think can be said in favour of the defendants is that the court ought to presume the existence of the particular entry spoken to by Satyendra, but it will not be right to draw a general presumption in their favour that other material facts must also have been similarly entered.

STORY OF KUSHAPUTTALIKA

In their petition of the 8th January, 1936 (*supra*) the defendants themselves specifically mentioned certain matters in respect of which they stated that the missing pages, if produced, would have exposed the "mass of false evidence" adduced on behalf of the plaintiff. These matters were said to relate to the plaintiff's story of an alleged proposal of '*kushaputtalika*' at Jaidebpur, Satyendranath Banerjee's supposed presence at the second Kumar's *sradh*, the date of his leaving Jaidebpur for Calcutta after his return from Darjeeling and the date of his coming to know of the

deed of management Although the items were thus separately set out, they all hinged upon one central fact, the date of Satyendra's return to Jaidebpur from Calcutta, whether it was before or after the second Kumar's *śradh*, which it is known took place on the 18th May, 1909

As will be seen, the plaintiff's case is that before the *śradh* a rumour arose at Jaidebpur that the second Kumar's body had not been cremated and that this led to a discussion as to whether the *śradh* could be held without there first of all being a ceremony known as *kushaputtalika*. This consists in the burning of an effigy made of *kusha* grass, and is a ritual enjoined by the Hindu shastras to be performed when the dead body of a man who is taken to be dead cannot be found or when the body has for some reason or other not been cremated (See P W 1022, Vol 12, pp 14-15). Some of the plaintiff's witnesses, it appears, stated that the proposal of *kushaputtalika* had been mooted two or three days prior to the *śradh*, but that it was afterwards dropped, as Satyendra returned to Jaidebpur from Calcutta before the *śradh* and assured Bara Kumar that he had himself cremated the second Kumar. See, for instance, the evidence of Akhil Chandra Pakrashi, P W 37 (Vol 4, p 328, ll 33-40) incidentally, it may be mentioned this witness was not cross-examined on this point. To the same effect is the testimony of Hari Charan Krihtratra, P W 87 (Vol 5, p 15, ll 34-39), Lal Mohan Goswami, P W 852 (Vol 9, p 480, ll. 32-36, and cross-examination, p 493, ll 30-34), and Sati Nath Banerjee, alias Sagar, P W 977 (Vol 11, p 183, ll 12-23 and cross-examination, p 205, ll 33-36). Jyotirmoyee Dēvi, P W 660, also states that Satyendra returned to Jaidebpur a day or two before the *śradh*, and that though there was a previous talk of *kushaputtalika*, it was not held (Vol 8, p 289, ll 8-9 and 15-16), she does not say, however, whether it was at the instance of Satyendra that the proposal was abandoned.

Satyendra in his evidence totally denied the story of *kushaputtalika*, and stated that it was wholly untrue that he had said anything to Bara Kumar in consequence of which such a proposal was dropped, and in support of his statement he asserted that he was not present at Jaidebpur on the day of the *śradh* or even a day or two before it took place, that he was away in Calcutta at the time, and that he returned to Jaidebpur either on the day following the *śradh* or the day after (Vol 16, p 433, ll 10-13).

Apparently the defendants considered the date of Satyendra's return to Jaidebpur to be very material for the purpose of combating the story of *kushaputtalika*, and it was from this point of view that they made such a grievance of the non-production of the whole diary which they say would have at once disclosed the dates of Satyendra's movements between Jaidebpur and Calcutta about this time.

It is obvious, however, that such a grievance could be made, if at all, only in regard to the pages between the 13th and the 20th May, 1909, and that, too, because of Satyendra's specific statement referred to above that the date of his arrival at Jaidebpur after the second Kumar's *śradh* had been entered in the diary. But whether even this would have been legitimate or not in the lower court, seeing that there was no cross-examination of Satyendra on his statement about having returned to Jaidebpur after the *śradh*, there can in my opinion be no possible room for any grievance now on this score, inasmuch as the learned judge has definitely accepted the defendants' case that Satyendra was not present at the *śradh* at all, having left Jaidebpur about the 16th May (Vol 18, p 50, ll 27-28). The defendants

surely could not expect a more favourable finding as the result of production of any of the missing pages of the diary

Whether the absence of Satyendra from the *svadh* affects the story of *kushaputtalika* or not, is quite another matter, which the learned trial judge has dealt with in his own way (*Vol 18, pp 50-51*), but the production or non-production of the whole diary can have nothing to do with it

PROCURING OF INSURANCE AFFIDAVITS

In this court Mr Chaudhuri referred to another specific matter on which he said the court ought also to draw a presumption against the plaintiff from the non-production of the whole diary, namely, as regards the case which was put to Satyendra in cross-examination and which he denied (*Vol 16, p 541, ll 19-20*), that he had sent a man to Darjeeling in July 1909 to procure the certificate of death of the second Kumar from Calvert which was dated the 7th of that month (*Ex Z(111), Vol I, p 178*) I am not at all satisfied that this is a position open to Mr Chaudhuri to take up in this court. In the first place, no proper foundation was laid in the evidence for such a presumption. Satyendra did not say if he had made any entry or what entry he had made in his diary regarding this particular matter and I do not think it can be taken to have been sufficiently indicated by the general statement he made about "other incidents" (*Vol 16, p 544, l 40*). This was certainly not even hinted at in the defendants' petition of the 8th January, 1936 (*Vol 17, p 90*). Secondly, the evidence of the diary, even if forthcoming, could only have been of a negative character on the question as to whether Satyendra had sent a man to Darjeeling how could this be either a contradiction of the plaintiff's case or corroboration of that of the defendants? Supposing by parity of reasoning the plaintiff were to argue, with reference to the pages of the 7th, 8th and 9th May, that a presumption should be drawn against the defendants in respect of the happenings of these dates not actually recorded, would Mr Chaudhuri be prepared to face the position?

One really wonders why Mr Chaudhuri should be so anxious to rely on presumptions for the purpose of demolishing the plaintiff's case regarding matters on which it should have been possible for his clients to adduce positive evidence of a convincing character. Take this very question of procuring Calvert's death certificate. The plaintiff by his cross-examination of Satyendra, not to speak of positive evidence on his side,—(see for instance, *P IV 952, Vol 10, p 455, ll 35-39*),—left the defendants in no doubt as to the case he was making, namely, that it was Satyendra who had arranged the whole of this business (*Vol 16, p 541, ll 19-20*). Satyendra's evidence was that he had not gone to Darjeeling to secure this or any of the other certificates of death and cremation which were required by the insurance company, viz, those of Siddheswar De (*Ex 29, Vol I, p 182*) and of Sashu Bhushan Banerjee and Satya Prosad Ghosal (*Ex Z(202), Vol I, p 183*), but that these certificates or "insurance affidavits", as they have been called, were obtained by the then Manager of the estate Juan Sankar Sen by correspondence with one Rai Bahadur Hari Mohan Chandra who had settled in Darjeeling after retirement (*Vol 16, p 433, ll 23-32 and p 541 ll 19-20*). In support of this case the defendants produced a letter from Calvert to this Rai Bahadur dated the 7th July, 1903, forwarding the death certificate of the second Kumar, which he says Dr Pal had asked him to send, and asking that his fees might be paid (*Ex Z(120) (a), Vol I, p 180*).—Dr Pal referred to here being Dr Sisir Kumar Pal who was and still is

Superintendent of the Lewis Jubilee Sanitarium (*Vol 2, p 493, ll 14-15*). On the back of the letter is an endorsement showing that Rai Bahadur Hari Mohan Chandra sent Rs 32 to Calvert as his fee

Plainly, this letter is wholly inconclusive on the crucial question as to at whose instance Rai Bahadur Hari Mohan Chandra had moved in the matter. It is difficult to accept Satyendra's statement that it was at the instance of Jnan Sanker Sen. As the learned judge points out (*Vol 18, p 53, ll 32-35*), Jnan Sanker Sen had virtually ceased to be the Manager in June 1909, if not earlier. Apart from evidence adduced by the plaintiff, there is Satyendra's own entry in his diary under date 29th June (*Ex 399(59), Vol I, p 326*) — "Manager Sen to 'Jdpore' (obviously, a misprint for 'retire') I hear from to-morrow", as well as an earlier entry of the 22nd June (*Ex 399(17), ibid, p 321, ll 10-11*) in which he writes that the Collector said, "Sen must go, as his resignation has been accepted". There is a further entry on the 11th July that Sen's brother is asking Satyendra to "speak to the Kumars if they can let him off quietly" (*Ex 399(60), ibid, p 329*).

If, as Satyendra says, there was correspondence between the Manager of the estate and Rai Bahadur Hari Mohan Chandra, it was evidence within the defendants' possession and power and might have been easily produced, and this would certainly have been a more satisfactory course for proving a fact within their special knowledge than asking the court to draw inferences regarding the contents of missing pages of Satyendra's diary.

It appears that Rai Bahadur Hari Mohan Chandra had started a special file at the Lewis Jubilee Sanitarium called the "Bhowal Kumar's Condolence Meeting file", out of which the defendants produced the letter from Calvert to the Rai Bahadur referred to above and several other documents through a witness Nalin Mohan Basu, Assistant Medical Officer of the Sanitarium (*Vol 2, pp 486-498*). It is only reasonable to suppose that if there was a letter to the Rai Bahadur requesting him to procure the death certificates, it should have been on the Condolence file, but the defendants caused to be produced only 35 sheets from this file which was collectively marked "M" for identification (*ibid, p 495, ll 21-25*), the witness stating quite definitely in cross-examination—"There are certainly more papers in the said file than the papers marked "M", as the file is not complete with the papers marked "M" (*ibid, p 496, ll 12-13*). The defendants also made no attempt to prove that any such correspondence as was referred to by Satyendra could not be traced among the papers in the Bhowal Estate Office at Jaidebpur or Dacca. Neither, it may be added, did they call Dr Sisir Kumar Pal, Superintendent of the Sanitarium, who was still alive and might doubtless have thrown some light on the matter. After this, one is not much impressed by a complaint coming from Mr Chaudhuri's clients regarding the non-production of any pages of Satyendra's diary.

ALLEGED PROMISE OF DONATION AT DARJEELING BY SATYENDRA

While on this subject, it is not out of place to mention that it was the plaintiff's case that before leaving Darjeeling after the second Kumar's supposed death, Satyendra held out to Rai Bahadur Hari Mohan Chandra a hope that he might expect from Bibhabati Devi a donation of Rs 30,000/- for the Lewis Jubilee Sanitarium, this being the sum for which the Kumar's life had been insured, and that it was by this clever move that Satyendra managed to bespeak the active interest of the Rai Bahadur in his behalf. The Rai Bahadur was a retired member of the Provincial Executive Service

near future",—though, as he admits, Mr Banerjee knew his and his sister's address (*Vol 16, p 522, ll 29-33*)

With all this and other evidence on various points staring them in the face, I cannot help remarking that Mr Chaudhuri's clients would have assisted the court better by disclosing all the contemporaneous records which were in their possession or power than by trying to build a grievance on the plaintiff's supposed suppression of a few pages of Satyendra's diary which have certainly not been proved to have been in his possession

NO MOTIVE FOR PLAINTIFF'S SUPPRESSION OF MISSING PAGES

As for this charge of suppression, there is just one other remark I should like to make. There was no more telling fact for the plaintiff to keep back than that of death at midnight, and yet he does not suppress the page recording "Kumar Ramendra expired midnight", but seeretes only such pages as might either show that on one particular date Satyendra was in Calcutta and not at Jaidebpur, or perhaps omit to show that on another date he was corresponding with Rai Bahadur Hari Mohan Chandra! Speaking for myself, I feel bound to say that the impression which the proceedings in the case have left on my mind is that the plaintiff has not only made a full disclosure of his documents, but been ready and anxious to face all documents coming from the opposite side, whereas it is the defendants who have demonstrably failed to come up to that standard of straight dealing. It is necessary only to refer to some of the petitions filed by the plaintiff calling for official documents, such as those of the 17th March, 1932 (*Vol 2, p 350*) and the 6th September, 1934 (*Vol 10, p 101 and p 104*), and to the grounds which were put forward on the other side for withholding many of them.

It remains to add a few words regarding the alleged theft of Satyendra's diary by Monmohan Bhattacharyya. There is nothing on the defendants' side to show when the theft took place, but Mr Chaudhuri stated to us that it must have been somewhere about May or June, 1921. Satyendra's statement is, as already pointed out, that he saw his diary last at Dacca in 1911, and according to him it was among the papers which he had left at his rented Nalgola house there and which were subsequently stolen (*Vol 16, p 525, ll 34-35*). In their petition of the 8th January, 1936 (*Vol 17, p 90*) which has been referred to above, the defendants made the definite suggestion that the diary must have come into the plaintiff's hands at least as early as December, 1921 when Dr Ashutosh Das Gupta was cross-examined in the Defamation Case. The ground which was put forward in support of this suggestion was briefly that certain dates regarding the movements of Satyendra about the time of the second Kurpar's *snadh* were put to the witness on behalf of the defence, and as these dates would be found in the diary, the inference was drawn that the diary must have been in their possession. As the defence in that case was admittedly helped by the present plaintiff, the further inference seemed to be irresistible that the diary must have been in the hands of the present plaintiff as well. Whether this chain of deductions supports the conclusion drawn or not, it seems to be obvious that if the defendants are right in their suggestion, they on their part must also have known as early as December, 1921 that the diary was in the plaintiff's custody. Yet it is not understood why no steps were taken by them to compel disclosure of the document by the plaintiff, or why not even a word about the alleged theft was put to the plaintiff or to the supposed thief himself who gave evidence on his behalf in October-November, 1934 (*P IV 952, Vol 10, p 448*).

It is undoubtedly a feature of this case that many of the documents of the defendants got into the hands of the plaintiff. The plaintiff has not chosen to give any evidence as to how he got them, but assuming that he obtained some of them by means which were not fair, that might perhaps excite justifiable moral indignation, but it leaves the authenticity of the documents wholly unaffected, when the defendants on being confronted with them could not possibly deny the genuineness of their contents. Strictly speaking, it should have been for the defendants to disclose these documents of their own accord without having to be forced to admit them under pressure. It is remarkable that though the defendants are making such a grievance against the plaintiff for having secured surreptitious copies of official documents, not a single question was put to him about it while he was in the box, nor a suggestion made to any of his witnesses that having somehow or other got the copies, the plaintiff was shaping his case accordingly. The complaint is really on the plaintiff's side that the defendants' case did not correspond to the official records.

DARJEELING CHAPTER

Having sufficiently cleared the ground, I pass on now to the Darjeeling chapter proper. The two outstanding questions to be considered in connection with it are whether or not the second Kumar died, and whether or not his body was cremated. Leading up to and bearing on these, are a number of other questions, each an important topic by itself and more or less related to the others. On all of these points it is remarkable the parties are divided in their respective cases. The plaintiff says that the Kumar did not die and he was not cremated, whereas the defendants maintain that death as well as cremation was an undoubted fact. The subsidiary topics may be broadly indicated —

- (a) Nature and course of the second Kumar's illness,
- (b) Cause of his death or apparent death,
- (c) Honour of alleged death,
- (d) Alleged cremation procession in the evening,
- (e) Alleged rain and storm on the night of 8th May,
- (f) The morning procession,
- (g) Alleged rescue by sadhus.

Putting aside the question of rescue as a distinct topic, the other items may be treated in the order stated, but in dealing with these it will be impossible to avoid some amount of overlapping.

As direct evidence of death, it may be stated, the defendants rely strongly on a number of documents, all referred to already, namely,—

- (1) Calvert's letter of condolence to Bara Kumar written on the 10th May, 1909 (*Ex Z(205), Vol I, p 419*),
- (2) Calvert's death certificate of the 7th July, 1909 (*Ex Z(111), Vol I, p 178*),
- (3) Other insurance affidavits (*Ex Z(202), Vol I, p 183, Ex Z(113), ibid, p 187*),
- (4) Entries in Satyendra's diary, particularly of the 8th May, 1909 (*Ex 399 (I), Vol I, p 306*).

There is one document, Calvert's letter to Lindsay of the 3rd August, 1921 (*Ex Z(127)*, *Vol II*, p 350), which Mr Chaudhuri would be only too glad to avoid so also one of the affidavits of death (*Ex 29*, *Vol I*, p 182), which had to be tendered by the plaintiff and then admitted by the defendants

Apart from this, there is on the defendants' side a mass of oral evidence consisting of the testimony of Satyendra (*Vol 16*, pp 423-545) and Bibhabati Devi (*Vol 12*, pp 196-315), besides that of several other members of the Darjeeling party who had accompanied the Kumar, such as Birendra Chandra Banerjee (*Vol 15*, pp 314-377) and Bepin Behari De (Bepin Khansama) (*Vol 14*, pp 487-505), and of a nurse named Jagat Mohini (*Vol 1*, pp 281-299), as also that of Calvert himself (*Vol 2*, pp 201-224), in addition to which body of evidence there is the further testimony of witnesses of the morning cremation who speak to having seen and recognised the body which was cremated as that of the second Kumar. There is one witness of theirs, however, on whose evidence the defendants positively do *not* rely, and he is Dr Ashutosh Das Gupta (*Vol 16*, pp 240-346), the family physician who had gone to Darjeeling with the Kumar, and on their own showing, attended him throughout his illness there, learned counsel for the defendants himself describing the evidence as "one mass of contradiction and confusion". Another such witness, also a member of the Darjeeling party, on whom, to a little less extent, Mr Chaudhuri does not rely, is Anthony Morel (*Vol 2*, pp 367-431)

RESPECTIVE CASES AS MADE IN THE PLEADINGS

Before proceeding further it may be useful to state shortly the case made in the pleadings regarding illness, death and cremation. The plaintiff's case is summarised in paragraph 2 of the plaint (*Vol 1*, pp 119-168), where, after stating that in April, 1909 he went to Darjeeling for a change accompanied by his wife Bibhabati Devi and some other relations and officers, he avers that during his stay there he fell ill, and "while he lay unconscious by the administration of poison in the course of his treatment", he was taken for dead and carried to the *sasan* on the night of the 8th May, 1909. After the body reached the *sasan*, there was severe storm and rain and the persons who carried the body left it there, and took shelter elsewhere. On their return they missed the body and went away. A few days after, the plaintiff on regaining consciousness found himself amongst *Naga saumyasis* (nude mendicants), and having recovered under their nursing, he began to live with them. At that time as the result of the administering of poison, his memory of the past was almost effaced.

In the joint written statement filed on behalf of Bibhabati Devi and the adopted son Ram Narayan Roy (*Vol 1*, pp 172-180), these defendants deny all the above allegations which they characterize as "maliciously false and that to the knowledge of the plaintiff" (paragraph 11). In paragraph 12, they state that the second Kumar was ill for some time and in 1909 went to Calcutta for treatment. He was there treated by some eminent doctors, and on their advice proceeded to Darjeeling shortly after for a change, accompanied by his wife, his wife's brother Satyendra, the family physician Dr Ashutosh Das Gupta, his private secretary Mankanda Lal Guin, his officer and relation Birendra Chandra Banerjee and some other officers and servants. At Darjeeling he was placed under the treatment of Col Calvert, Civil Surgeon, and Rai Nibaran Chandra Sen Bahadur, Assistant Surgeon, having had an acute attack of bilary colic from which he had been suffering for

some time. The treatment was of no avail, and he died on the 8th May, 1909 at about midnight. The defendants set out in the next paragraph *in extenso* the condolence letter which Calvert wrote to Bara Kumar on the 10th May, 1909. As it was not possible to make necessary arrangements for the cremation at night, the dead body was taken out the next morning in a procession befitting the position of the Kumar, coins being distributed to the poor on the way. At the *sasan* the body was duly cremated and burnt to ashes. In the following paragraph, the defendants quote in full Calvert's death certificate of the 7th July, 1909, and another certificate of death given at a later date by W. M. Crawford, the then Deputy Commissioner of Darjeeling, both of which certificates, it is stated, had to be obtained in connection with the claim on an insurance policy on the life of the second Kumar.

In paragraph 20, a categorical denial is given to the allegations that the second Kumar was poisoned, that he became unconscious and was taken to the cremation ground at night, that rain and storm came on thereafter, that the mourners left the body and took shelter elsewhere, and that on return they found the body missing and went back home. The defendants also deny that the Kumar recovered consciousness a few days after and found himself in the midst of *Naga samnyasis*, or that he recovered as the result of this treatment and continued to live with them, or that he had almost lost his memory as the result of the poisoning.

Ananda Kumari Devi, who filed a separate written statement (*Vol. 1, pp. 185-188*), beyond admitting that the Kumar accompanied by his wife had gone to Darjeeling for a change, denied each and every one of the allegations in paragraph 2 of the plaint and stated her belief that the second Kumar had died at Darjeeling shortly after his arrival there.

POINTS OF DIVERGENCE

With reference to the different topics indicated above, the divergences between the plaintiff's case and that of the defendants may be summarised thus:—

Topic	Plaintiff's case	Defendants' case
(1) <i>Nature and course of illness</i>	(i) Ill from early morning of 6th May to evening of 8th May (ii) Ordinary gastro-intestinal irritation followed by symptoms pointing to arsenic poisoning	(i) Ill from early morning of 6th May to midnight of 8th May (ii) Biliary colic
(2) <i>Cause of death or supposed death</i>	Not biliary colic, but judging from symptoms, arsenical poisoning	Collapse following upon an acute attack of biliary colic (gall-stone) due to the stone getting impacted in the cystic duct
(3) <i>Hour of death</i>	About dusk on the evening of 8th May	Midnight (11-45 p.m.) of 8th May
(4) <i>Evening cremation</i>	Cremation procession in the evening of 8th May and to <i>old sasan</i> , turning	No procession or cremation in the evening of 8th May

Topic	Plaintiff's case	Defendants' case
	ont to be abortive owing to disappearance of body	
(5) <i>Rain and storm</i>	Heavy rain and storm at night on 8th May, causing the mourners to run away for shelter, leaving the "dead" body, which they subsequently missed on their return	No rain or storm either on 8th or 9th May
(6) <i>Morning cremation</i>	Funeral procession on the morning of 9th May along Commercial Road route to <i>new sasan</i> with a body not that of the Kumar hurried cremation	Funeral procession on the morning of the 9th May along Thorn Road route to <i>new sasan</i> with the body of the Kumar, and normal cremation with full rites and ceremonies
(7) <i>Rescue</i>	Rescue by a sannyasi or sannyasis from the sasan	No rescue—story altogether faked

CHARGE OF CONSPIRACY

The court below held in favour of the plaintiff on every point, except that on the question of alleged poisoning, it expressed itself in a way which led Mr Chaudhuri to argue that the court had come to a finding negativing a charge of "conspiracy" to poison. It was wrong out of Dr Ashutosh Das Gupta in cross-examination that he had given the second Kumar on the night of the 7th May a medicine, according to his own prescription, which contained a dose of arsenic (*Ex 51 (a), Vol I, p 277, same as copy produced during commission evidence in London, Ex 427 (d), Vol I, p 293*). The evidence did not disclose any other irritant than the arsenic in this prescription. The giving of this medicine, according to the learned judge, was itself an extremely suspicious circumstance, even if the suspicion was not deepened by the fact that Dr Das Gupta first denied that it was at all his prescription (*Vol 16, p 247, ll 1-8*), and then, as the judge says, tried to hide it by perjury (*Vol 16, p 247, ll 1-8, p 251, l 26, p 252, l 24, p 255, ll 8-18, p 265, etc*). In view of this state of the evidence, what the court said was that so long as the "bare possibility" remained that Dr Das Gupta had given this medicine to the plaintiff "like a quack" and got frightened at the result, it could not find that he had done it "wilfully" to cause death (*Vol 18, p 353, ll 14-16*). Whether this really amounts to a finding against conspiracy, as Mr Chaudhuri contends, is more than doubtful. It is one thing to say that the court cannot find there was conspiracy, and it is quite a different matter to hold that there was none. A positive finding, such as would rule out the existence of a conspiracy, is something very different from a statement which is on the face of it of a negative character, merely expressing the inability of the court to hold conspiracy as definitely established. As it is, the learned judge does no more than say that on the evidence he could not find conspiracy as a fact, not that the evidence established the contrary. Suffice it to point out that in the very next sentence he goes on to state that he must find "that the

irritant was arsenic as there was nothing else, and nothing else explains the symptoms that appeared the next morning" (*Vol 18, p 353, ll 15-17*)

Mr Chaudhuri made a great point of the fact that there was no conspiracy to poison pleaded in the plaint, and he contended, therefore, that not only could the court not come to a finding against his clients on the question, but it should have shut out all evidence of conspiracy. This, again, is a contention which to my mind has no merit in it for, I am not aware of any rule of pleading which required the plaintiff to set out any part of his evidence in the plaint. He made a definite allegation of poisoning in his pleading, and this in my opinion was quite sufficient, and undoubtedly entitled him to give evidence of facts from which conspiracy could be inferred. The relevancy of these facts lay in this that they had an important bearing on the question of the subsequent conduct of the parties concerned in attempting to conceal the real cause which had produced the condition of apparent death of the second Kumar.

In this court Mr B C Chatterjee stated to us quite early in the course of his arguments that his definite case was that on the evidence there could be no room for any theory of accidental administration of poison, and in my opinion there is nothing in the judgment of the trial court which might be supposed to contradict such a case, if it could be established.

FINDINGS ON DARJEELING CHAPTER—HOW FAR BASED ON IDENTITY

As I have said before, the court below has found in favour of the plaintiff on all material points in the Darjeeling chapter, but in dealing with the various questions which arise out of the contentions of the parties in this connection, it will be necessary to bear in mind the criticism which Mr Chaudhuri repeated before us with unwearied insistence that the learned judge did not make any independent examination of the relevant evidence on these points and came to no independent findings thereon. His conclusions, it was said, were in the last analysis based on his findings already arrived at on the question of identity. It will be seen that this betrays a complete misapprehension of the judgment. As will appear in connection with each of the topics to be dealt with, there is really no basis for suggesting that the method followed by the judge is not to arrive at a straight conclusion of fact on the evidence on any particular point, but merely to state some of the difficulties in the plaintiff's way and then to avoid a conclusion by saying that whatever the evidence on the defendants' side and whatever the improbabilities in the plaintiff's story, they do not displace the identity already found.

Mr Chaudhuri fastened upon a number of passages he picked out from the judgment which, taken out of their setting and read as isolated statements, might perhaps lend some support to his contention, but such support is no more than plausible, and it is really a travesty of the judgment to found on these and suggest that the learned judge deduced every finding of his on death and cremation ultimately from identity. It is just as well to refer to these passages, and consider their real import in connection with the five main questions formulated by Mr Chaudhuri. (The references hereunder are all to *Vol 18* of the paper-book)

APPELLANTS' GENERAL CRITICISM CONSIDERED

I On the first question—real death or only apparent death—Mr Chaudhuri quotes the following passage as if the learned judge's conclusion on this point was expressed therein —

"The fact that the body was left at the *sasan* (cremation ground) during the rain and disappeared, is no proof that it was alive, and the real proof is that the plaintiff is the same man" (p 394, ll 10-12)

And further on —

"Nobody will accept this evidence, or accept it as proof of identity, if it were not otherwise proved, but granted the identity, there would be no reason to reject it" (*ibid*, ll 18-21)

All this, it will be observed, was said by the learned judge, not in connection with the question of death or apparent death, but with reference to the plaintiff's story of rescue, and if anything, the first extract really puts the case very much against the plaintiff. What the learned judge means to say is that the plaintiff has got to prove that the body, "was alive", but he cannot discharge this onus merely by showing that the body had disappeared from the *sasan* he must further prove that he was the man whose body had so disappeared. It could doubtless be said that this further proof was furnished by the evidence of identity, which the learned judge had already accepted and which, if accepted, would make it unnecessary to go into the evidence of rescue and of the plaintiff's life as a sannyasi after rescue. All the same the learned judge says he must still take the evidence given to prove rescue and the sequel until the plaintiff's appearance at Dacca. The last extract merely points out that this evidence is quite consistent with the conclusion already reached on the question of identity, not that, having regard to the unusual character of the story, this evidence will be accepted as proof of identity. The learned judge makes this quite clear later on where, referring to the evidence of the rescuing sadiu Darsan Das, he says,

"It can no more prove the identity than the testimony of many of the numerous witnesses on the plaintiff's side unchecked by facts resting on nobody's credibility alone. But given the identity, otherwise proved, the account is clear and consistent, and unshaken by cross-examination" (p 394, ll 30-34),

and again —

"This account reads like a fairy tale, and if the plaintiff needed it to establish his identity, he would fail, for it can no more be found on this testimony than it can be found upon his testimony that he is the Kumar" (p 396, ll 22-25)

In other words, the learned judge accepts the story of rescue as corroborated by the evidence of identity.

II With reference to the second question—the hour of death—Mr Chaudhuri refers to two passages, in which he concedes that the learned judge does make a "sort of attempt" to come to an independent finding that death took place at dusk —

(i) "For, indisputable facts point to and establish, that the Second Kumar 'died' or was taken as dead at between 7 and 8 P M on

the 8th May That is established by the following, not one of them, but all taken together" (p. 355, ll 18-21)

- (ii) " . . . if the body of the Kumar was taken there (i.e., to the *sasan*) that night, as it must have been, if he had died at about dusk" (p. 376, ll 17-18)

It is difficult to see how from these passages any one can reasonably contend that the finding as to the hour of death was not based on a consideration of the evidence. Mr Chaudhuri's specific complaint is that the learned judge did not refer to the evidence of Bibhabati Devi or to the documentary evidence of the defendants on the point. This is wholly incorrect (see, for instance, page 362, ll 35 *et seq* where the defendants' oral evidence is considered), and is admittedly so with reference to the documentary evidence, which, Mr Chaudhuri could not deny, is dealt with at p. 393 of the judgment, where the learned judge after stating the facts appearing in defendants' evidence says,—

"All these facts are swept away by the facts I gave, which show that the apparent death was at night, and the body was taken out at night" (p. 393, ll 35-36)

Instead of quoting these lines which express the learned judge's view regarding the documentary evidence, Mr Chaudhuri relies only on the opening sentence of the next paragraph in which he summarises his general conclusion on this part of the case as a whole —

"My conclusion on this topic is that nothing repeals the conclusion touching the identity of the plaintiff with the second Kumar" (p. 393, ll 37-38)

This, to my mind, amounts to a definite finding of the learned judge that he does not accept the defendants' case regarding death and cremation by which they sought to demolish the plaintiff's claim to identity.

Mr Chaudhuri tried to present the learned judge's line of reasoning on this question in his own characteristic way the argument, he said, seemed to be this—that since the plaintiff was the same man he must have escaped cremation, and he could have escaped cremation only if he was taken to the *sasan* at night on the 8th May, and that he could not have been taken there then, unless the apparent death had taken place at dusk, and that *ergo* the apparent death took place at dusk. With all respect to Mr Chaudhuri, this is a gross caricature of the learned judge's line of argument which he might have been spared.

III On the third question—the evening procession and failure of the cremation—Mr Chaudhuri first quotes the following passages —

- (i) "The real test of the evidence touching this part of the enquiry is the hour of death, but of the witnesses who joined the funeral procession at night, or saw it pass, one (that is, one of these witnesses) might well rest on his own credibility, and another (is) almost as good as he" (p. 364, ll 27-30)

(ii) Then again —

"This account, however consistent, will sound like a tale. Its real security is the "death" at dusk, and the fact that the body was taken to the *sasan* that night. This last fact might well rest upon the fact of death at dusk alone, or thus coupled with the evidence of Padmuni Babu, but there is besides other

evidence of people who had seen the procession pass at night etc" (p 366, ll 20 et seq)

How these two extracts at all support Mr Chaudhuri's criticism is more than I can comprehend

The first question was whether the Kumar's body was taken out to the *sasan* in the evening as alleged by the plaintiff, and the second, whether the body was then cremated. It is evident that the whole of the plaintiff's story would be wiped out, if the supposed death had not taken place at dusk, and this is all that the learned judge meant by saying that the real test of the evidence touching this part of the inquiry was the hour of death. This did not mean that he was not going to consider the positive evidence given by the plaintiff regarding the evening procession or the failure of the evening cremation, but intended to rest his finding merely on the fact of "death" having taken place at dusk. In point of fact, as the judgment will show, he did consider and accept the evidence of the plaintiff's witnesses who say that they joined the funeral procession at night and went to the burning ground, among whom he specially mentioned two, viz., Padmini Mohan Neogy, P W 655 (*Vol 8, pp 249-255*) and Chandra Singh, P W 968 (*Vol 11, pp 84-94*). He also considered "other evidence", including the testimony of persons who had seen the procession pass at night, and it is these witnesses whose evidence he does not give in detail, but accepts all the same, though in doing so he makes a remark which, if anything, only shows his fairness, but which is seized upon by Mr Chaudhuri as showing that ultimately death at dusk remained the only ground in support of the finding on the third question. The remark is this—"They would not be believed if death at dusk was not a fact, and if that was a fact, there would be no reason to disbelieve them" (p 366, ll 37-38). The witnesses of whom this is said are specifically mentioned by the learned judge—P W 940, Ranjit Shingh (*Vol 10, pp 379-382*), P W 963, Indra Singh Satri (*Vol 11, pp 49-52*), P W 966, Dhanjit (*Vol 11, pp 61-64*), P W 978, Lal Chand (*Vol 11, pp 237-240*), P W 980, Mahammad Ashraf Alam (*Vol 11, pp 246-251*), and P W 983, Santa Bir Shingh (*Vol 11, pp 259-263*). None of these witnesses are among those who accompanied the procession to the *sasan* (*Vol 13, pp 365-366*).

IV As regards the fourth question—the burning of a substituted dead body on the 9th May—Mr Chaudhuri says that the learned judge is most direct in his reliance on identity, and quotes the following observations from the judgment—

"The extreme improbability of this case is obvious, and its real answer is the identity of the plaintiff, and the fact, apart from this identity, that 'death' had occurred at a little after dusk and the body taken out at night, and that body never cremated. But the evidence on this point must be dealt with on the footing as if these facts have not been found" (p 377, ll 23-28)

Here, again, one is at a loss to appreciate the point of Mr Chaudhuri's comment. It is doubtless admitted by the plaintiff that a body, not that of the second Kumar, was taken out in the procession on the morning of the 9th May, and it also remains a fact that the plaintiff has not been able to adduce any evidence as to whose body it was, or how it had been procured, or that it was not the body of the Kumar. But as I have endeavoured to explain in an earlier part of this judgment, this part of the plaintiff's case need not necessarily rest on positive evidence that the body was not that of the second Kumar, but may be held to follow as a

legitimate inference from other facts—death at dusk, attempted cremation in the evening and its failure, coupled with the fact that the body was not taken back to the house, during the night. The plaintiff's story of a substituted body is no doubt on the face, of it an improbable one, as is frankly stated by the learned judge himself, but the mere fact that it is improbable need not stamp it with falsity. In the passage which Mr Chaudhuri quotes the learned judge does not profess to meet the case of "extreme improbability" by reference only to identity as a proved fact, but expressly mentions other facts, which apart from identity would in his opinion constitute a complete answer. All the same, although the learned judge definitely found the other facts as well as identity fully established on independent evidence, he still proposed to examine such evidence as was on the record regarding the burning of a substituted body on the footing as if those facts had not been found. It is surprising that instead of acknowledging the obvious fairness of the learned judge in so dealing with the matter, learned counsel for the defendants should find in this a ground for an unmerited attack. The "evidence on the point" which the learned judge says he proposed to consider is *inter alia* the evidence on the plaintiff's side regarding the suspicious circumstances attending the morning procession and the morning cremation, the evidence of Dr Pran Krishna Acharyya, and Satyendra's statement in cross-examination that it was not his case that the body of the second Kumar was taken away in the evening, brought back and taken out again, next morning (Vol 16, p 540, ll 35-40).

A further passage from the judgment which Mr Chaudhuri quotes in this connection is this —

"If the identity has been proved with mathematical certainty, it cannot be displaced by the cremation in the morning of a substituted body. Everybody appreciates its extreme improbability, but it cannot displace the identity" (p 393, l 44—p 394, l 3)

Quite characteristically, again, in quoting this passage Mr Chaudhuri leaves out the words which follow immediately after—"and the facts connected with it, and the lies told about it—Kasiswari Devi and her alleged part in it and the rites and all the rest—and the fact that less than 10 days after the declaration of identity by the plaintiff Satya Babu goes to Darjeeling to pin the witnesses down, show that it was not a normal funeral at all" (p 394, ll 3-7)

I have no hesitation whatever in rejecting Mr Chaudhuri's contention that the sole ground of the learned judge's conclusion on this part of the case is identity, and that, to quote Mr Chaudhuri's words, "the judge omits altogether to consider the improbabilities and the proper effect of his own finding that there was no conspiracy and no deliberate poisoning",—this last, by the way, as I have already shown, not being his real finding at all.

V As regards the fifth question—that of rescue and the plaintiff's life with the sannyasis—Mr Chaudhuri relies on certain passages already dealt with in connection with his first question, and quotes two further extracts from the judgment where the learned judge deals with the story of the plaintiff's wanderings.

On this question of rescue and after, it may perhaps be argued with some show of reason that the learned judge relies to some extent on identity what he says is that the evidence on these points could not be relied on in proof of identity, but if identity was otherwise established, the story became quite acceptable.

This is what he says.—

"The account that the plaintiff gives of this period of his life rests on his testimony and that of Darsan Das (*P IV 991, Vol II, pp 378-422*), but it discloses nothing that shakes the conclusion otherwise reached, and not on the strength of this account that he is the same man as the Kumar" (*p 398, ll 22-25*)

Again, in conclusion —

"Mr Chaudhuri reasonably asked why it should be supposed that in the plaintiff's case unusual features occurred. The answer is that from Darjeeling to this point the enquiry is not to establish identity, but to see if anything excludes it, the identity being established by other facts. If that is proved, there is nothing from Darjeeling to his arrival at Daeca that would shake the conclusion, and given the identity, there will be no reason to reject it on the ground that it involves a breach of a law of nature. It involves no such breach" (*p 402, ll 23-30*)

These last observations were made with special reference to the defendants' arguments against the plaintiff's story of loss of memory, but Mr Chaudhuri had to admit before us that he could not maintain the view that the plaintiff's case on this head must be rejected merely because it did not happen to correspond to any recorded case of abnormal psychology, be it amnesia or double personality or a case of any other type.

Having read and re-read the judgment with the closest attention in the light of Mr Chaudhuri's criticisms, I feel bound to say that it is absolutely futile to contend, as he did, that on none of the points concerning the events at Darjeeling and after, was there any independent finding on the evidence and the probabilities. Mr Chaudhuri permitted himself a fling at the judge in rather picturesque language. "The judge", he said, "toils with his problem through ninety-four weary pages like Sisyphus with his stone, and one finds it rolling down every time back upon identity." No wonder, thus drey forth from Mr Chatterjee the retort that Sisyphus in this figure of speech was not the learned judge, but learned counsel for the defendants who was continually rolling down to the point of identity from the hill-top, where the learned judge had quite safely landed his stone.

Mr Chaudhuri, I may mention, avoided reading the judgment as a whole but placed excerpts only, thereby conveying to the court, at any rate to me, a wrong perspective altogether which had to be corrected later. It is this failure to take a complete and comprehensive view of the judgment that seems to me to lie at the bottom of much of the criticism which has been directed against it. Looking at the judgment as a whole, it is not indeed difficult to follow the scheme which it adopts in dealing with the broad aspects of the case.

SCHEME OF THE JUDGMENT

The learned judge starts by saying that the main question is whether the plaintiff is the second Kumar, and he takes up the issue of identity first. He might perhaps have begun with the question of death and cremation, and it may be that if he came to a finding on this question in favour of the defendants, that might have meant an end of the plaintiff's case. But equally may it be said that a decision in the plaintiff's favour on the issue of identity ought to be an end of the defendants' case. The fact remains that the learned judge has dealt with identity first, and he gives his reasons,

right or wrong, for his conclusion that the plaintiff is the Kumar. He examines the grounds on which identity may be established. He takes up first what he describes as the direct evidence of identity on the plaintiff's side (*Vol 18, pp 124-157*) this consists mainly of evidence of recognition by near relations and others which he holds to be honest, followed by long and intimate association with the family without producing any disillusionment. He considers also the direct evidence given by the defendants for the purpose of negating identity, which he finds himself unable to accept (*ibid, pp 157-183*). He next examines the points of physical similarity or dissimilarity urged on one side or the other, and is convinced by the marks of identity—the "rocks", as he calls them, in the "morass" of evidence—which, he says, in their collocation can never occur in a second individual (*pp 183-252*). The learned judge is not, however, content to rest his conclusion on these facts alone. He checks and tests them by reference to other facts which might conceivably provide a check and a test.

To this end he first turns to explore the mind of the plaintiff to see if it is at all different from that of the second Kumar as it might have been, if he were alive to-day, and finds it is not (*ibid, pp 255-278*). This is not all. He then proceeds to apply the test of literacy and hand-writing (*ibid, pp 278-304*), and holds that the plaintiff satisfies this test. Still another question he thinks he must consider—whether the plaintiff is a Bengalee or not, and his answer is in favour of the plaintiff (*ibid, pp 402-422*). This he reserves to the last as the more convenient course to be dealt with along with the question of the Punjab enquiry. But the crowning and most decisive test which he holds the plaintiff must survive in order that identity may be placed on an unshakeable basis is death and cremation, and to this issue he, therefore, addresses himself with an open mind,—considering the evidence, as I think, entirely on its merits with a view to see if it yields a result consistent with identity or in contradiction thereto, and not, as Mr Chaudhuri supposes, twisting, torturing or suppressing the evidence in order to extract from it a conclusion in conformity with his pre-conceived views on the question of identity.

That takes the learned judge to the Darjeeling chapter, and on every one of the topics arising in connection with it, he examines the evidence on either side, tries to appraise it at its proper value according to his lights, and then finally comes to his conclusions. In dealing with this chapter, what he does is this. He first goes into the question of the nature of the illness. Is it a fact that the Kumar died of bilary colic, as suggested by the defendants, or is it a fact that he developed symptoms of arsenic poisoning, as the plaintiff alleges? Then he takes up the question of hour of death, because he considers death at dusk to be the crux of the plaintiff's case, and finds in favour of the plaintiff. Then comes the question about the funeral procession, and on the evidence he holds that a procession left the house the same evening about 9 P.M. But this is not enough. There still remains the question as to whether it was followed by a successful cremation, and he takes up this point, and rightly or wrongly, comes to the conclusion that the cremation failed.

The next question he takes up is that of the morning cremation which is a very important part of the case, particularly as a morning cremation is admitted by the plaintiff. On this topic, there is the defendants' positive evidence that the body which was taken out was that of the Kumar. On the other hand, there is the plaintiff's evidence, but this evidence falls short of establishing affirmatively that the body was not that of the Kumar. There

are, however, certain suspicious circumstances from which the court is asked to draw an inference to that effect, these circumstances being that the face was covered up and the funeral was not a normal funeral. The court has got to set this against the defendants' positive evidence, as it has also to set against the plaintiff the improbability inherent in his story—that of another body being procured and substituted in the course of the night.

This at once raises the question, whether this improbability is so overwhelming that the plaintiff's story must be rejected out of hand on this ground. The learned judge thinks not, for he holds that there are certain facts, apart from identity, already established which according to him, in their cumulative effect, tend to override such improbability.

He finally proceeds to deal with the question of the alleged rescue of the plaintiff by a party of *sannyasis* at the cremation ground and traces the history of his wanderings till he arrives at Buckland Bund in December, 1920 or January, 1921.

To my mind, there can be no doubt that this in broad outline is the scheme of the judgment, but whether any particular link in the learned judge's chain of reasoning is sound or not, nothing is gained by misrepresenting his method of treatment or the tenor of his judgment. As the evidence comes to be examined, it should appear if there was really any justification for the attempt so sedulously made by Mr Chaudhuri to reduce the learned judge's mode of handling the case to the point of absurdity.

Before dealing with the evidence of the second Kumar's illness, which is the first in the list of questions to be considered in the Darjeeling chapter, it will be helpful to set out a number of documents to which frequent reference will be necessary. They are—

- I a set of telegrams which appear to have been sent from Darjeeling to Bara Kumar at Jaidehpur about the second Kumar's illness, and
- II a number of prescriptions made at the time at Darjeeling for the second Kumar.

I TELEGRAMS

In all, seven telegrams from Darjeeling have been produced, three of the 6th, one of the 7th and three of the 8th May, 1909. Five of these were sent through the Railway and two were Indian Telegraph messages sent from the Darjeeling Post and Telegraph Office. The telegrams, it will be remembered, were among the papers which were sent to Sarajubala Devi by Needham in April, 1917 (*Vol II*, p 74) and were afterwards sent on by her to Lindsay in pursuance of his requisition of the 27th October, 1921 (*Ex 55, Vol II*, p 355). Sarajubala retained copies of the documents which she filed before the Commissioner (*Vol 3*, p 72, ll 6-10), and copies of these telegrams have been marked as exhibits on behalf of the plaintiff on the admission of the defendants, the defendants producing the originals. It is somewhat remarkable that none of the telegrams was sent by Satyendra, but the sender was either Mukunda Guin, Private Secretary of the second Kumar, or Cabral, or Dr Ashutosh Das Gupta. Satyendra admits, however, that he had seen to the despatch of these messages (*Vol 16*, p 465, ll 13-21).

The telegrams in order of despatch were as follows, the addressee in each case being Bara Kumar —

6TH MAY, 1909

- 1 Sender ... Mukunda
 Hour of despatch . 10 A M
 How sent Railway
 Message "Last night Kumar had fever below
 99 No anxiety No fever now
 Kindly wire health" (Ex 261,
 Vol I, p 296, original marked
 Ex 261 (a))
- 2 Sender Cabral
 Hour of despatch 6-45 P M
 How sent Railway
 Message "Kumar attacked fever yesterday with
 severe stomach pain Civil Surgeon
 attending" (Ex 223, Vol I,
 p 294)
- 3 Sender Mukunda
 Hour of despatch 8-55 P M
 How sent Indian Telegraphs
 Message "Fever abdominal pain lasted two
 hours Now remission No anxiety
 No fear of recurring" (Ex 224,
 Vol I, p 301)

7TH MAY, 1909

- 4 Sender Mukunda
 Hour of despatch 7-10 A M
 How sent Railway
 Message "Kumar had good sleep last night
 No fever No pain" (Ex 282,
 Vol I, p 297, original marked
 Ex 282(a))

8TH MAY, 1909

- 5 Sender Dr Ashutosh Das Gupta
 Hour of despatch 7-20 A M
 How sent Indian Telegraphs
 Message "Had fever slight pain yesterday
 Now normal No anxiety" (Ex 225,
 Vol I, p 302)
- 6 Sender Mukunda
 Hour of despatch 11-15 A M
 How sent Railway
 Message "No fever slight pains vomiting
 tendency Civil Surgeon attending
 No anxiety Coming giving rice
 Wire 1,000 passage" (Ex 221,
 Vol I, p 298, original marked
 Ex 221(a))

7	Sender	Mukunda
	Hour of despatch	3-10 P M
	How sent	... Railway
	Message	"Kumar is seriously ill Frequent watery motions with blood Come sharp" (Ex 222, Vol I, p 300)

TELEGRAM FROM BARA KUMAR (8TH MAY)

8	Sender	Bara Kumar
	Hour of despatch	4-45 P M
	Message	"Very anxious Wire condition very often Treat with best medical help Wire immediately present condition" (Ex 260, Vol I, p 299)

The plaintiff has examined one Niranjan Roy, P W 982 (Vol 11, pp 255-258), who was a signaller at the Jaidebpur Railway Station in May, 1909 and speaks to some of the telegrams which were received by him during his hours of duty, 6 A M to 6 P M. He explains the code words indicating the hour of despatch as well as the nature of the message the telegrams marked Exs 222-225 being all urgent. This witness states that at Jaidebpur telegrams came by two systems, Railway and Postal. Telegrams received at the Railway Station were despatched immediately by a messenger, but at the Post Office receipt and delivery of telegrams would take place only during office hours mentioned in the Telegraph Guide. The particulars of the telegrams given above have been verified from the originals and are accepted as correct by both parties.

II PRESCRIPTIONS

Six prescriptions in all have been produced, one of the 6th May, one of the 7th, and four of the 8th. Of these, that of the 6th and two of the 8th May were by Calvert, and the other two of the 8th are by Dr Nibaran Chandra Sen, while the remaining prescription, the only one of the 7th May, purports to be by Dr Ashutosh Das Gupta. The originals of none of these prescriptions are forthcoming, but certified copies were put in which were obtained from the record of the Defamation Case, in which the originals appear to have been produced. Both sides have accepted these copies as correct, and it is admitted by Dr Ashutosh Das Gupta, D W 365, that these were all the prescriptions made for the second Kumar during his illness at Darjeeling (Vol 16, p 268, l 26). This witness had previously deposed about the Kumar's illness not only twice in the Defamation Case in which he was the complainant, but also in a group of Title suits of 1921 instituted by the Bhowal Raj which have been collectively referred to as the Sripur case, and in which it appears a plea of defect of party was taken on the ground of the second Kumar not having been joined, leading to the raising of an issue, though afterwards expunged, involving the question of identity of the plaintiff. Dr Das Gupta's statements in these cases were put to him in cross-examination in the present suit and have been marked as exhibits (Sripur case—Exs 391-394(20), Vol III, pp 19-24, Defamation Case—Ex 460, Vol II, pp 375-397). He admits that he had seen the prescriptions at the time he was previously deposing (Vol 16, p 260, ll 12-13 and l 32), and he had also read them as well as the telegrams and his former depositions before he gave his evidence at this trial (*ibid*, p 248, ll 8-10,

p 254, ll 23-24) At one stage he no doubt suggested that his present evidence was better, as his memory was now refreshed by the telegrams and prescriptions, implying that he had not seen them on the previous occasions (*ibid*, p 253, ll 22-23, p 254, ll 26-29, p 256, l 10, p 260, ll 37-38), but this was a position from which he was quickly forced to retire (*See judgment, Vol 18, p 328, ll 1-9*)

It is significant that though the defendants put to Calvert an interrogatory (*Interrogatory No 10, Vol 2, p 202, ll 6-8*) asking if he remembered having prescribed any medicine to the second Kumar, and if so, for what disease, they did not apparently want him to refer to any of the prescriptions, not even to the three he had made. A note was added to the interrogatory merely to the effect that the witness might, if he liked, refresh his memory by the death certificate and the letter of condolence. In his answer Calvert stated that he had seen copies of prescriptions which he recognised as prescriptions he was in the habit of giving for stomachic troubles. But he found it difficult to say if these would be consistent with the treatment of the second Kumar for his last illness. They might be suitable for "interval treatment", but not for the attack itself (*Vol 2, p 204, ll 10-19*). In cross-examination he made it clear that all that he was shown by the defendants' solicitor before giving his deposition were copies of his own prescriptions, which were marked Z 1, Z 2 and Z 3 for identification (*ibid*, p 211, ll 1-16). Copies of other prescriptions were also put to him in cross-examination by the plaintiff, and marked A 1, A 2, A 3, A 4, A 5 (*ibid*, p 216).

The prescriptions, which were all dispensed by a local firm of pharmaceutical chemists, Smith Stanistreet & Co, may now be set out —

6th May, 1909

(Only one prescription)

1 Prescription—by Calvert

Ex 51, Vol I, pp 273-274

Same as Z 1 shown to Calvert, Ex 433, *ibid*, p 275
Druggists' serial number—3412/3

(i) Re—

Spt Amon Aromat	℥ iii
Sodii Bicarb	℥ i
Tinct Card Co	℥ vi
Spt Chloroform	℥ iss
Aqua Cinamon	ad ℥ vi
Mft—mixt	
℥ i—One mark every 2 hours	

(ii) Re—

Lint Opu	℥ u
For external application	

7th May, 1909

(Only one prescription)

2 Prescription—by Dr. Ashutosh Das Gupta.

Ex 51(a), Vol I, p 277

Same as A 5 shown to Calvert, Ex 427(d), *ibid*, p 293
Druggists' serial number—3430.

Re—

Quinine Sulph	Gr 1v
Aloin	Gr ½
Ext Nux Vomica	Gr ⅓
Euonymin	Gr 1
Acid Arsimor (Arsenius)	Gr 1/100
Ext Gent	Gr
Mft Pill (silver)	

I T D S P C

This is the only prescription containing arsenic and will be referred to as the Arsenic prescription

N B—In the copy shown to Calvert (A 5), Ex 427 (d), Vol I, p 293, occur the words "Send 25", which are not to be found in the copy, Ex 51(a) at p 277

8th May, 1909

(Four prescriptions)

3 Prescription—by Calvert

Ex 51(e), Vol I, p 285

Same as Z 2 shown to Calvert, Ex 433(a), *ibid*, p 287

Druggists' serial number—3439

Re—

Mag carb	
Sodi bicarb	
Bismuth Carb	
Pulv Tragacanth Co	aa 3 1
Oil cajuputi	m xii
Aqua menth pip	ad 3 vi
T D S	

4 Prescription—by Dr Nibasan Chandra Sen

Ex 51(b), Vol I, p 279

Druggists' serial number—3440/1

(i) Re—

Sodi Citrate	3 1
Aqua Sterilised	ad 3 vi
3 1 with milk as directed	

Same as A 1 shown to Calvert, Ex 427, *ibid*, p 289

(ii) Re—

Glycerine pepsin	3 ii
As directed	

Same as A 2 shown to Calvert, Ex 427(a), *ibid*, p 290

(iii) Re—

Pep Powder fresh

(iv) Re—

Atropia Tab	Gr 1/100
Strych Tab	Gr 1/30
Digitalin Tab	Gr 1/100
Ether Pure	½ oz
Morpha Tab	Gr ⅓

This last prescription has been referred to by Mr Chaudhuri as the "Armoury", but as the learned judge points out, it is not really a prescription, but merely a requisition for a number of standard drugs in tabloid form and a little pure ether (Vol 18, p 342, ll 6 and 16)

5 *Prescription—by Calvert*

Ex 51(c), Vol I, p 281

Same as Z 3, shown to Calvert, Ex 433(b), ibid, p 288

Druggists' serial number—3442/3

(i) *Re—*

Spt Ether	3 iv
Spt Amon Aromat	3 iv
Aqua Camphor	ad 3 viii

¼ for a dose

(ii) *Re—*

Ext opu	
Belladonna	
Saponis	ad Gr ½

Mft Pill send 6 such
1 T D S

6 *Prescription—by Dr Nibaran Chandra Sen*

Ex 51(d), Vol I, p 283

Druggists' serial number—3444/5

(i) *Re—*

Lint Saponis	
Sinapis Co	ad 3 ii

To rub all over the limbs with ginger powder
Same as A 3 shown to Calvert, Ex 427(b), ibid, p 291

(ii) *Re—*

Lint Chloroform	
Belladonna	ad 3 ii

To be applied over the stomach

Same as A 4 shown to Calvert, Ex 427(c), ibid, p 292

(iii) *Re—*

Spongis Lehm	12" x 12"
--------------	-----------

NB Some of the abbreviations used in the prescriptions may be explained —

aa	of each a like quantity
ad	up to
f or ft	fiat, make
m	misce, mix (thou)
mist	mixture
ss	semisse, half
t d s	ter die sumendus, take thrice a day
p c	post cibum or cibos, after food or meals

It will perhaps be convenient to refer to the prescriptions hereafter, not always by their exhibit numbers, but by their serial numbers in chronological order as in the list given above, with date

The prescriptions as well as the telegrams are the only available contemporaneous documentary evidence of the second Kumar's illness, but obviously it can never be a satisfactory process to try and reconstruct the illness from the prescriptions. The best evidence on the point would undoubtedly be that of the attending physicians who had seen the patient, and the defendants have actually examined two of them, Col Calvert (*Vol 2, pp 201-224*) and Dr Ashutosh Das Gupta (*Vol 16, pp 240-346*), the third doctor Nibaran Chandra Sen having died. Unfortunately, however, Dr Ashutosh Das Gupta was a witness who was unceremoniously abandoned by defendants' own counsel and whose evidence one has only to read to be convinced beyond doubt that the learned judge did not at all over-state the case when he said, "this doctor came before me not to tell the court frankly what had happened, but to hide it altogether" (*Vol 18, p 325, l 44—p 326, l 1*). As regards Calvert, he himself protested when he was asked about the symptoms, saying—"You ask me 21 years after the man's death!" (*Vol 2, p 209, ll 26-27*), and again, when asked —

"Did you prescribe any medicine for the pain in the right side of the abdomen when you saw the Kumar first?"

he answered —

"I wish to protest against questions on immaterial matters which, in my opinion, after I had stated clearly the facts I know I remember, may lead me, or confuse me, to think that I remember these small details after so long a lapse of time" (*ibid*, p 210, ll 16-23)

After this, one would hesitate to feel at all safe in accepting his evidence even as regards the "details" on which he made it appear his recollection was better or less "confusing"

Apparently realising the difficulty of the position, Mr Chaudhuri invited us to accept the evidence of Bibhabati Devi, who, as the learned judge says, gave a "clear-cut" account of the second Kumar's illness. She is undoubtedly a person who may be expected to remember the facts connected with her husband's death, but it will be seen that the apparent strength of her evidence seems to constitute its real weakness

VALUE OF PRESCRIPTIONS AS EVIDENCE

This and other oral evidence will all have to be duly considered, but the prescriptions read with the telegrams are not altogether without value, for even if it may not be possible to draw a "clinical picture" of the second Kumar's condition from these materials, they might still be of use in testing the case made by either party regarding the nature and course of the illness. From this point of view, it appears to me, the plaintiff was fully justified in putting the prescriptions not only to Calvert, but to other medical witnesses who were called on one side or the other, such as Major Thomas, D W 9 (*Vol 12, pp 336-376*) and Lt-Col Denham White, D W 401 (*Vol 17, pp 152-171*) for the defendants, and Lt-Col MacGilchrist, P W 815 (*Vol 9, pp 340-368*) and Dr Bradley, P W 989 (*Vol 11, pp 348-369*) for the plaintiff. I fail indeed to see any point in the criticism which was advanced by Mr Chaudhuri in this connection on the strength of certain observations of Jenkins, C J, in *Jaral Kumari Dass v Bissessur Dull*, (1911) 1 L R 39 Cal 215 at pp 257-258. On the other hand, I consider it a circumstance very

much in favour of the plaintiff that he procured and put in evidence copies of the prescriptions as well as of the telegrams,—yet another proof of his counsel's claim that his client was not only willing but anxious to face all available documents in support of his case. Dr Ashutosh Das Gupta admitted in the Defamation Case that he used to keep copies of prescriptions, and that was also his statement in the present suit (*Vol 16, p 292, l 37—p 293, l 5*). The plaintiff actually called for the prescriptions from him, but these were not produced (*ibid, p 308, l 38—p 309, l 2*), and the plaintiff was consequently obliged to get the copies from elsewhere. The prescriptions obviously could not be expected to prove arsenical poisoning, if anything, they might be of help to the defendants to prove their case of biliary colic, and yet the defendants would not put them to the consultant physician whom they called, nor to any of their other medical witnesses except to rebut the case made by the plaintiff.

ARSENIC PRESCRIPTION

As already stated, among the prescriptions there was only one, prescription No 2 of 7th May (*Ex 51 (a)*), which contained arsenic, and that in a very small dose, 1/100th of a grain, as against the lethal dose which is generally taken to be two grains (*P W 815, MacGilchrist, Vol 9, p 343, ll 9-10*, and *P W 989, Bradley, Vol 11, p 361, l 9*), and it is necessary to state that it is not the plaintiff's case that the arsenic which got into the system of the Kumar and produced the symptoms of this form of poisoning must have been conveyed through this source, though this was the basis assumed by the defendants in their examination of their medical witnesses with reference to this prescription. Thus, for instance, to Major Thomas, *D W 9*, they put the case thus —

Q—If these pills in *Ex 51 (a)* were given in accordance with the directions contained in the prescription, would they have caused any symptoms of arsenical poisoning?

A—No. One pill three times a day, no.

Q—Assuming that the second Kumar had colic pain on the 5th May and again on the 6th and his stomach was in an irritable condition, would the administration of three of these pills according to the direction in the prescription bring about symptoms of arsenical poisoning?

A—No. I don't think so.

Q—Assuming that 3 of these pills were given trussed up in solution, were they likely to cause symptoms of arsenical poisoning?

A—No.

Quinine sulphate is extremely bitter. Aloin and nux vomica are intensely bitter. Aloe is proverbially bitter. Arsenic is tasteless practically. Eucalyptin is very bitter also.

Q—If 12 of these pills were trussed up together in solution and given to the patient, what would happen?

A—He would, it is practically certain, vomit the whole lot up.

Q—Why?

A—Because, in the first place, these intensely bitter and irritating drugs would in such quantities irritate even a normal stomach—

even 48 grains of quinine also, and secondly, from the history I understand that the Kumar had already shown some tendency to vomit and that is all the more reason why this mixture should be rejected

My answer would be the same—it would apply even more so in the case of 25 pills given all at once

Q—If 25 of these pills were trussed up together, would the patient show any sign of poisoning?

A—He would show signs of strychnine poisoning, if any

In 25 of these pills there will be nearly half a grain, 5/12th of a grain, and in addition to this there would be brucine the effect of which will add itself to the effects of strychnine

Assuming 12 pills were given, still more likely that the symptoms of strychnine poisoning would appear rather than arsenic, because the strychnine and arsenic would be in the same proportion with regard to one another

If a poisonous dose of *nux vomica* was administered, the symptoms would be those of strychnine poisoning, viz, convulsions, spasms, resembling tetanus. The common symptom would be opisthotonos and that is spasmodic arching of the back

Q—Within what period of the administration of such *nux vomica* would such symptoms appear?

A—The symptoms would appear within a few minutes, 20 minutes at the latest

If a lethal dose were administered, death would take place within half an hour

I should say that the symptoms of strychnine poisoning are very dramatic, and a medical man worthy of the name would certainly know them. There is no mistaking them for any other symptoms except perhaps those of tetanus" (*Vol 12, p 338, l 11—p 339, l 21*)

To the same effect was the examination-in-chief of Lt-Col Denham White, D W 401 (*Vol 17, p 157*)

It will be observed that Major Thomas was practically not at all cross-examined by the plaintiff on the statement he gave in his examination-in-chief. All that was put to him was this —

"*Q*—To the question 'Arsenic is contra-indicated when gastritis or intestinal irritation is present', Col Calvert said, 'I would not prescribe it' (*Vol 2, p 217, ll 22-24*) Do you agree?

A—I agree. Personally I would not prescribe either" (*Vol 12, p 358, ll 7-10*)

This shows that the plaintiff made the case that this prescription so far as it went appeared to exclude biliary colic. On the other hand, a definite suggestion was put to the witness that this might be used as a "cloak"

"*Q*—Do you know that in India people wanting to poison by arsenic arm themselves in the first instance with a prescription containing arsenic?

A—I should think it very possible that they would do that" (*ibid., p 358, ll 30-33*)

Similarly, there was no cross-examination of Lt-Col Denham White by the plaintiff directed to showing that any pill or pills prepared according to this prescription might have produced the symptoms of arsenical poisoning in the second Kumar. All that was elicited from him was that from Calvert's evidence, not from the prescriptions, he formed the opinion that the case was one of *enteritis*, and in this the pills in *Ex 51 A*, which he called "horrible", would certainly not be given (*Vol 17, p 166, ll 13-15*)

In my opinion, Mr Chaudhuri was not at all justified in stating, as he did at an early stage in his opening, that the arsenic prescription was the whole basis of the plaintiff's story of poisoning. This was not made the basis either by the plaintiff in his evidence, or by the trial court in its judgment, as is clearly shown in the following remarks of the learned judge —

"as though it is anybody's case that if arsenic had got into the Kumar on the 7th and led to the symptoms, it must have come from this source. Dr Thomas admits what is obvious that if any one were minded to poison anybody with arsenic, he would make or get a prescription that might serve as a cloak and (be) capable of explaining the symptoms which include diarrhoea and blood in stools and arsenic in stools" (*Vol 18, p 331, ll 32-37*)

This is not at all inconsistent with the other passage on which Mr Chaudhuri relies, where the learned judge states that the "giving of this medicine" by Dr Ashutosh Das Gupta, meaning thereby the giving of a medicine prepared according to this prescription (*Vol 18, p 353, ll 11-15*), would itself be a circumstance of grave suspicion against him. As the learned judge explains clearly enough, the suspicion is not necessarily that Dr Ashutosh Das Gupta gave the medicine to the Kumar with felonious intent to kill him, but only that in making the prescription he had some ulterior purpose in view, and in support of this he calls attention to the evidence given by the witness regarding this prescription (*see for instance, Vol 16, p 251, ll 8-25, p 254, l 30—p 255, l 30, p 264, ll 18-19, p 283, ll 5-6 and ll 15-17*).

It is no doubt true that in their examination-in-chief the plaintiff's medical witnesses dealt with the possible effect of an over-dose of the pills in *Ex 51(a)* on the patient, and said that in certain conditions even a therapeutic dose of arsenic might cause symptoms of poisoning (*MacGilchrist, Vol 9, pp 342-343, and Dr Bradley, Vol 11, pp 351, 352 and p 353, ll 24-26*). But as the learned judge points out, this evidence was given only "to illustrate the action of the drugs" (*Vol 18, p 330, ll 28-32*). Col MacGilchrist in fact expressly stated in cross-examination —

"I was not told that there was an attempt to poison the patient by giving him a large dose of A 5",

meaning thereby the arsenic prescription (*Vol 9, p 354, ll 21-22*)

Again,—

"Nobody told me that 12 of these pills were in fact administered. So far as my information goes, the poisoning might be due to accident—I have already said I had no knowledge as to whether it was due to accident or otherwise. There was no information that there was an attempt to poison the person" (*ibid, p 354, ll 38-42*)

Dr Bradley's evidence was not otherwise and he gave quite a reasonable explanation as to what would make him think of an over-dose of this prescription —

"Q—What brings over-dose in your mind?

A—The picture of arsenic poisoning I mean, if I had been called and seen the patient in that condition and seen this prescription, *Ex 51(a)*, the first question that I would ask (is) 'How many of these have you given him?' " (*Vol 11, p 352, ll 7-11*)

To any reasonable doctor, observing the symptoms and not suspecting foul play, a mal-administration of this prescription would naturally be the first thing to occur as a likely explanation

I may mention that on the 5th December, 1938, during Mr Chaudhuri's opening I distinctly asked him to state if he said that it was the plaintiff's case, supposing poison had been administered, that it had been done through some medicine prepared in accordance with this prescription, *Ex 51(a)*. Mr Chaudhuri definitely answered that that was not so. In fact I suggested to him at the time that the prescription might have been used as a sort of "camouflage", and he admitted that such a suggestion had in fact been put by the plaintiff to the defendants' medical expert Major Thomas

It is not really difficult to follow the plaintiff's case on the point it is that the evidence unmistakably points to the Kumar having developed symptoms of arsenical poisoning, and also to an overwhelming probability that the administration of the poison was deliberate, suggesting a conspiracy between at least two persons, Satyendranath Banerjee and Dr Ashutosh Das Gupta. There was, however, expert medical evidence on record that normally the arsenic prescription, administered in medicinal doses, would not produce symptoms of poisoning, but it might, in particular cases, according to the idiosyncrasies of the patient. So long as this "bare possibility" remained, it would doubtless be open to the defendants to explain away the symptoms which according to the plaintiff the Kumar exhibited, on a basis other than that of wilful attempt to poison. In other words, if it was a criminal trial for murder, the defendants might claim the benefit of the doubt, and Mr Chatterjee pointed out that this was all that the learned judge meant in the passage already referred to, on which Mr Chaudhuri placed so much reliance as constituting a positive finding that there was no conspiracy at all —

"But so long as the bare possibility that he (Dr Ashutosh Das Gupta) gave this medicine like a quack and was frightened at the result remains, I cannot find that he did it wilfully to cause death" (*Vol 18, p 353, ll 13-15*)

These remarks of the learned judge, as I have said before, must be read along with those at *p 331, ll 31 et seq*. It remains only to add that the defendants neither admitted any symptoms of poisoning, nor attempted any explanation such as the medical evidence might suggest in their favour.

It may perhaps be useful now to summarise and collate briefly the medical evidence on the different prescriptions

(1) *Re Prescription No 1 (6th May)—Ex 51*
(*Vol 1, p 273*)

There are two medicines in it

- (i) a Spt Ammonia mixture, to be taken every two hours
- (ii) an opium liniment for external application

As to (i), the doctors are practically agreed that it is a simple carminative mixture for indigestion or dyspepsia, but will not be prescribed for acute biliary colic according to the defendants' doctors, it is, however, suitable for intervals of remission in biliary colic, while in the opinion of the plaintiff's medical witnesses, it is useless even for this purpose, if it is not wrong treatment altogether.

Calvert agrees that it is used in dyspepsia or indigestion (*Vol 2, p 211, ll 18-22*). Referring to the prescriptions generally, not merely to this particular one, he says that in between attacks of biliary colic or remissions according to the severity of the previous attack, the patient is left with an irritable stomach and intestines, during which time gastric sedatives are recommended by the authorities, and the prescriptions contain samples of such sedatives (*ibid, p 215, ll 22-27*). In other words, he means that this prescription is suitable for "interval" treatment in biliary colic. In a severe attack he agrees that the first step would be the administration of morphine or opium, but so far as he recollects, the Kumar had only minor attacks on and off, finally culminating in his fatal seizure, which was not anticipated (*ibid, p 219, ll 10-14*).

Col. Denham White, D W 401, also states that the prescription is suitable for an interval in biliary colic. Putting himself in the position of the attending doctor, he says that the doctor gave this medicine on the 6th May apparently because he saw some distension and probably constipation (*Vol 17, p 158, ll 25-26 and ll 19-21*). In cross-examination, on being asked, with reference to this and Calvert's next prescription, *Ex 51(e)* of the 8th May, if these are only prescribed in intervals of biliary colic, he says "No", and adds, these are "commoner garden" medicines (*ibid, p 166, ll 31-33*).

Major Thomas, D W 9, says that it is suitable for treatment of any kind of dyspepsia including flatulent dyspepsia in the intervals of biliary colic, but is no good for relieving pain of biliary colic (*Vol 12, p 337, ll 15-18*).

On the plaintiff's side, Col MacGilchrist, P W 815, says that he would prescribe this medicine in simple indigestion, particularly when there is flatulence, but not for a man suffering from biliary colic. In biliary colic, when acute, he would advise hot applications, fomentations, hot baths, if the patient is equal to them, and hypodermic injection of morphia. Sodium bicarbonate (which is an ingredient in this prescription) would be useless in a paroxysm during intermission it soothes the stomach and neutralises the acids, if there be hyper-acidity, and it increases the secretion of bile. What he would prescribe during intermissions is full diet, specially meat diet, which increases bile acids which have the power of dissolving gall-stones to some extent, and next, warm weak solution of alkalis, such as sodium bicarbonate or Vitchy waters or Carlsbad waters, and thirdly, exercise, abdominal massage (*Vol 9, p 341, ll 1-25*). He was pointedly asked in cross-examination —

"If a doctor prescribes Z 1, a doctor who has actually seen and examined the patient, as a medicine for the interval, would you call it a wrong treatment?"

The answer was —

"Useless. I would not call it wrong treatment but unnecessary. In the interval we give medicines to prevent formation of gall-stones, but this medicine will cause unnecessary trouble to the patient so far as biliary colic is concerned, and I call it not wrong, in the sense that it will cause no harm" (*ibid, p 356, l. 33—p 357, l 5*).

He admitted that if in the interval the patient had got flatulence and dyspepsia, the doctor would not be wrong in prescribing this medicine

According to Dr Bradley, P W 989, this is a very mild prescription for indigestion—a stock medicine (*Vol 11, p 348, ll 23-25*) Taking the two medicines in this prescription, he says the indications are indigestion—to relieve the pain of severe indigestion (*ibid, ll 30-31*) As regards interval treatment, he says there is not much to be done, but he would restrict or prohibit eggs in the diet, would give warm saline drinks, prescribe exercises and massage and advise the patient to go and see a surgeon in other words, the treatment is entirely surgical and not medical Shown this and the other two prescriptions of Calvert, he says he would not prescribe these for the intervals in biliary colic, unless by coincidence the patient had indigestion (*ibid, p 352, ll 31-37*)

As to whether indigestion or dyspepsia is caused by biliary colic, Dr Bradley says it is an extremely difficult question to answer loosely speaking, 50 per cent cases of gall-stone show no such symptoms (*ibid, p 353, ll 8-12*) Col MacGilchrist says that a man suffering from dyspepsia may get biliary colic, but not as an effect (*Vol 9, p 357, ll 13-14*) He accepts as one-sided the statement that in biliary colic most frequently the development of gall-stone is preceded and accompanied by continuous or intermittent dyspepsia (*ibid, p 359, ll 1-6*) Major Thomas has authority to show that one gets flatulent dyspepsia when one gets biliary colic with cholecystitis,—cholecystitis being inflammation of the gall bladder,—not that whenever one gets inflammation of gall bladder, biliary colic necessarily follows Or, as he puts it in a simpler form —“I can give an authority to show that you get flatulent dyspepsia with cholecystitis, and you also get biliary colic with cholecystitis” (*Vol 12, p 356, ll 29-35*) Col Denham White is of opinion that gall-stone cannot occur without inflammation of gall-bladder, and there is no case of biliary colic in which there is no dyspeptic pain in the stomach (*Vol 17, p 156, ll 29-36*) It is perhaps not necessary to put the matter on a more definite basis than the learned judge has done, namely, that dyspepsia is often a concomitant of biliary colic, be it effect or co-effect of cholecystitis (*Vol 18, p 324, ll 36-39*)

As to (ii), the trend of medical opinion is that this may be used to relieve superficial pain of any kind anywhere

Col Calvert admits that Lint Opi is a medicine for local pain of any description and may be used to relieve the pain of neuralgia He cannot say if there is any authority for using this medicine as an external application in biliary colic, but he adds that the question hardly arises, as this was not a case of what treatment was necessary for the patient, but what he would accept and agree to after consultation with his friends (*Vol 2, p 211, ll 23-35*) Later on, in answer to a suggestion that the authorities prescribe no medicine for painting externally in biliary colic, he says quite definitely —“No Nor should I with a patient except in the case of refusal of hypodermic medication” (*ibid, p 215, ll 11-14*).

Major Thomas admits that this is a medicine for external application for relieving pain anywhere, including the pain of biliary colic in the abdomen, though he would prescribe for this an injection of atropine with or without morphia (*Vol 12, p 337, ll 19-24*) In cross-examination he states that Lint Opi is not used now at all to relieve pain, not even pain of neuralgic character (*ibid, p 357, ll 33-35*)

Col Denham White says that Lint Opi may be given to relieve pain anywhere, and if a patient refuses hypodermic injection for pain of biliary

colic, it may be given as a substitute, but only as a second best (*Vol 17, p 158, l 32—p 159, l 4*)

Col MacGilchrist thinks that this preparation is useless in biliary colic, as the external application of opium leads to none of its active principles being absorbed, such as morphia and other constituents. Taking both the medicines in the prescription, *Ex 51*, he says that the Spt Ammonia mixture was for the stomach and the chances are that the Opium liniment was to relieve pain in the stomach (*Vol 9, p 341, l 38—p 342, l 8*). He is quite definite that the liniment is not an alternative, if the patient refuses morphia by hypodermic injections, as this would be wasted effort there are alternatives, e.g., morphia by the mouth, which he says might be given even during paroxysm. He admits that some doctors do prescribe liniment of opium for pain of any description (*ibid, p 356, ll 16-24*)

Dr Bradley would not prescribe this liniment at all 20 or 25 years ago when he first began to practise, it was used for massaging, for rubbing into sore, painful areas, and so forth, but experience has shown it is of no use, it is not absorbed. Taking the two prescriptions on *Ex 51*, the indications in his opinion are indigestion,—to relieve the pain of severe indigestion (*Vol 11, p 348, ll 27-31*)

The learned trial judge, it will be seen, has given a correct summary of the evidence regarding this prescription, *Ex 51*, in his judgment (*Vol 18, p 328*), and very fairly expressed the effect of this evidence by saying that while the medicines prescribed in it do not indicate biliary colic, they do not exclude it (*ibid, l 39*)

(2) *Re Prescription No 2 (7th May), Ex 51(a)*
(*Vol I, p 277*)

This is the arsenic prescription, and the only one to have been written and signed by Dr Ashutosh Das Gupta, which he had to admit, but he protested to the end that it was not his. His earlier attempt, both in the Defamation Case and the Stripur Case, was to make out that Calvert had come on the 7th May and made this prescription, but when Calvert disowned it in his cross-examination in the present suit, he at once changed his case and strenuously sought to impute it to Nibaran Chandra Sen, which, if the defendants' own medical witnesses are to be believed, really meant a slander on the professional reputation of a doctor who was then dead. The desperate struggle which this witness makes in his present evidence to get round his former statements is indeed a shameless exhibition of perjury which would not be believed, if it was not a fact. Suffice it to say that I accept without hesitation, and for the reasons the learned judge gives, the finding of the trial court that Dr Ashutosh Das Gupta was the real author of this prescription (*Vol 18, pp 332-333*)

Be that as it may, it seems to be fairly clear on the medical evidence on both sides that whatever else it may be, this is not a prescription for biliary colic.

It is just as well to begin with what Dr Ashutosh Das Gupta has to say about it. He agrees that the prescription contains "aloin" which aggravates diarrhoea, if the patient suffers from it. He agrees that it cannot be given to a patient suffering from biliary colic or diarrhoea, but adds that it can be given in malaria with constipation. The Kumar, he first says, had biliary colic with malaria on the 6th, 7th and 8th May, and he would accordingly

prescribe it for him (*Vol 16, p 251, ll 3-25*). A little later comes this further illuminating statement from him —

"If the second Kumar had diarrhoea and biliary colic on the 7th, I would not prescribe *Ex 51(a)* In diarrhoea, if he had diarrhoea, the prescription was unsuitable. It would do no harm. It would aggravate diarrhoea, might have done so—there is only mild purgative there. I agree that 'the prescription would not be given to a patient suffering from biliary colic or diarrhoea', as I said (Then says)—It could be given in biliary colic 'Alom aggravates diarrhoea', I still say that I would not give it in diarrhoea. If a man wanted to aggravate diarrhoea, he would give it. Dr Calvert and Dr Nibaran Chandra Sen certainly knew the action of alom. The second Kumar had gastric trouble on 6th, 7th and 8th May. I do not know that Dr Calvert has said that he would not prescribe arsenic in gastritis or where intestinal irritation is present" (*ibid, p 254, l 30—p 255, l 2*)

Still later, this further prevarication —

"To Mr S P Ghose I said in effect that on the 7th May the Kumar had diarrhoea and biliary colic, pain of biliary colic, and Dr Calvert relieved these by his prescription—so far as I then recollected. I do not say this now. This statement, if I made it now, would not be true. It would not be true as, to say one reason, I know that the medicine in *Ex 51(a)* cannot be given in diarrhoea" (*ibid, p 264, ll 18-24*)

And, then, again —

"Q—During the pain of biliary colic *51(a)* cannot be given?

A—No, unless there is some other complication

Q—Supposing a man suffering from chronic malaria has the pain of biliary colic, which would you treat?

A—Whichever is more acute

The pain of biliary colic I would call acute in such a case

Q—To tackle with that, you cannot give *51 (a)*?

A—No, I would give it if the man has malaria—the fever on with constipation. Diarrhoea does not mean constipation. I would not give *Ex 51(a)* to a chronic malaria patient who has diarrhoea and who is in the pain of biliary colic

That is the reason why my previous statement as to treatment and illness on the 7th was wrong" (*ibid, p 264, ll 26-38*)

Further on, he admits that he does not want to say that he sought to relieve the Kumar's biliary colic on the 7th by this prescription (*ibid, p 272, ll 9-11*), and he states later that the Kumar had biliary colic between 6 and 10 p.m. on the 7th May and the medicine in *Ex 51 (a)* was administered (*ibid, p 283, ll 5-6 and ll 15-17*)

It is not necessary to multiply further quotations from the evidence of this witness

Calvert was shown this prescription in cross-examination and asked if it was one for chronic fever or chronic malarial fever with or without enlargement of spleen and liver anaemia and constipation. He would say that this was a general tonic pill, and judging from the amount of quinine

in the pill, it had been given for malarial fever or the after-effects of malarial fever. He was not prepared to express unqualified acceptance of the suggestion that quinine should be avoided in persons suffering from gastro-intestinal irritation, but personally he would not give quinine by the stomach in such case. He did not agree that small doses of quinine would produce symptoms of cinchonism in cases of gastro-intestinal irritation, nor that such symptoms were delirium, comatose condition, collapse and hæmorrhage (Vol 2, p 216, l 27—p 217, l 7). As regards the other ingredients in this prescription, this is what he said —

"Q Do you agree that arsenic is contra-indicated when gastritis or intestinal irritation is present?

A Personally I should not prescribe it

Q Aloin is a cathartic?

A Yes, a purgative

Q So is euonymin?

A Yes

Q And actions of cathartics are hæmorrhage, severe abdominal pain and collapse with profuse diarrhoea?

A No You are talking of enormous doses" (*ibid*, p 217, ll 22-31)

In re-examination he denied that the quantity of arsenic, aloin and euonymin in the prescription would have any of the disastrous results suggested to him as the effects of cathartics, and doubted if the pill was ever absorbed, seeing that according to the prescription it was silver-coated and the patient's stomach was in an irritable condition (*ibid*, p 224, ll 8-13)

Looking to quinine, Major Thomas thought that it was probably given to treat fever, might be suspected malaria. Aloin and euonymin were purgatives, and he should guess the patient was constipated and needed a purgative. Nux Vomica and Arsenious acid were tonics. The doses of the different components were all within normal range, and he was definite that if these pills were given in accordance with the directions contained in the prescription, they could not cause any symptoms of arsenical poisoning (Vol 12, p 337, l 30—p 338, l 14). He agreed with Calvert that arsenic is contra-indicated when gastritis or intestinal irritation is present, and personally he would not prescribe it (*ibid*, p 358, ll 710)

Col Denham White also said that quinine and arsenic are common remedies for chronic malaria, and aloin and euonymin are purgatives, and he presumed that the doctor who prescribed this medicine had in his mind a case of chronic malaria, complicated by constipation. The doses were within prescribed pharmacopœial limits, and if the pills were given as prescribed, they would not cause any symptoms of arsenical poisoning (Vol 17, p 157, ll 2-10). Asked if there was any relation between this prescription and the earlier one, *Ex 51* (the first prescription), he said that the doctor apparently gave *Ex 51* because he saw some distension and probably constipation, and then as it failed, he took the rather "horrible step" of giving these pills in *Ex 51* (a) on the 7th when the patient probably had fever hence these "horrible pills"—he gave the purgatives and threw in arsenic and quinine (*ibid*, p 158, ll 18-24). As already stated, from Calvert's evidence, not from the prescriptions, he formed the opinion that the case was one of enteritis, and in this, he said, the pills which he called "horrible" would certainly not be given (*ibid*, p 166, ll 13-15)

In effect there is little difference between the evidence of Major Thomas and that of the plaintiff's expert Col MacGilchrist. This witness says that this prescription taken as a whole is a general tonic such as one gives in chronic malaria, particularly quinine and arsenic. He would not prescribe quinine for biliary colic, nor for gastric indigestion or flatulence. The doses of aloin and euonymin are in his opinion excessive, and would cause watery stools, griping and exhaustion. The first prescription, *Ex 51*, and this represent opposite ideas of what was wrong with the patient: the quinine and arsenic would both irritate the stomach instead of soothing it (*Vol 9, p 342, ll 11-26*). According to him, even therapeutic doses of arsenious acid may cause poisonous symptoms such as gastric irritation and rectal irritation and inflammation of the stomach and rectum and even blood in stools: this blood would be bright red blood in vomits or stools. Arsenious acid, assisted by quinine, is depressive of the heart and in toxic doses may cause collapse (*ibid, p 343, ll 12-17*). In cross-examination he admitted that taken as an ordinary tonic pill for malaria, its administration for two days, according to the prescription, would cause no harm, if there was no idiosyncrasy, but aloin and euonymin would cause purgation (*ibid, p 352, ll 33-38*). He added that he had no knowledge how many pills were actually administered, and had not been told about it (*ibid, p 353, ll 22-25*).

In Dr Bradley's opinion, *Exs 51, 51 (b), 51 (c)*—all point to stomach or gastric irritation, and in *Ex 51 (a)* the ingredients indicate profuse diarrhoea, which means that the entire intestinal tract was involved (*Vol 11, p 352, ll 14-19*). He would not prescribe it for intervals in biliary colic unless by coincidence the patient had indigestion (*ibid, p 352, ll 36-37*). If he had prescribed *Ex 51* on the 6th May, he would most definitely not prescribe *Ex 51 (a)*, because the latter is too irritating to the gastro-intestinal tract. He also states that arsenicum acid has been known to cause poisoning even in therapeutic doses (*ibid, p 353, ll 22-26*). Arsenic, he says, is more a tonic than a stimulant, and it is almost never given in stomach troubles because it irritates, but it is alternative (*ibid, p 360, ll 5-9*). He admits that the general form of the prescription would indicate malaria, but it is usual to modify the action of aloin and euonymin with belladonna. He does not consider the prescription to be a normal one, because it contains a big dose of quinine—too big for tonic and too small for malaria, and added to it are two strong purgatives,—it must have been given with a special idea at the back of the mind of the doctor (*ibid, p 360, ll 19-24*).

I think the learned judge was quite correct in this stating the effect of the whole of the evidence regarding this prescription, *Ex 51 (a)* —

"There is thus no difference between the doctors as to this prescription—that it will suit chronic malaria, and will purge, and will irritate the stomach. Nobody says that it is a medicine for biliary colic, not even Dr Ashn who says that it will not suit in biliary colic" (*Vol 18, p 331, ll 25-28*).

(3) *Re Prescription No 3 (8th May), Ex 51 (c)*
(*Vol 1, p 285*)

This is Calvert's second prescription and of the 8th May, the last day of the Kunjar's illness, which he agrees is suitable for acidity of the stomach, pain in the stomach, vomiting, diarrhoea and tenesmus being prescribed with "bismuth carb", it may be used in dyspeptic diarrhoea (*Vol 2, p 212, ll 32-34*). He is asked if there is any medicine in it for stopping "blood

stools", but avoids a direct answer by saying that there is no such medical term as "blood stools" (*ibid*, p 212, ll 35-37) When the question is varied—

"Q—If a patient is passing watery motions with blood, is there any medicine in this prescription for stopping the blood?"

he again side-tracks it and answers—

"A—It is not usual for patients to pass watery stools with blood. The late Kumar never passed watery stools with blood"

He adds, however, that had the Kumar done so, the treatment would have been adapted, if possible, to the cause of that condition (*ibid*, p. 213, ll 1-6), which, to my mind, involves an admission that this prescription contained no medicine for stopping blood Calvert goes on to affirm that the Kumar passed motions consisting of "blood-stained mucus 'with a little free blood'" —this was either in the morning or in the middle of the day, and though earlier in his evidence he protested against being asked to describe the symptoms "21 years after the man's death" (*ibid*, p 209, l 27), he remembers enough to be able to add that he was told the Kumar had passed about a dozen such stools, and not merely that, he remembers also that he saw them, and "the blood was fresh and red in colour" (*ibid*, p 213, ll 6-12) "This symptom of blood-stained mucus", says the witness, "was an indication of the severity of the colic and the danger of the case and called for an immediate injection of morphia", and "the cause", he diagnoses, "was the great straining and spasm due to an impacted stone"

Calvert was challenged to quote authority that "fresh, red blood" might be due to any such cause in biliary colic, but all that he had to say was —

"I do not know of any authority on gall-stone diseases in India, but I am not prepared to accept 'the authorities of other countries'" (*ibid*, p 213, ll 19-20)

He referred to three or four cases within his personal experience, where, however, he discovered blood in the interior of the intestine *only after post mortem examination* (*ibid*, p 213, ll 20-27) He could cite neither authority nor experience to show that blood in stools occurred *in life* in a case of biliary colic He had to agree that in biliary colic there is usually marked constipation, and blood stools are not generally a symptom (*ibid*, p 214, ll 1-15) He gave his reason for not trying to stop the passing of blood— for, says he —

"I was not concerned in stopping the hæmorrhage which in itself was trifling, but in *attacking* the cause of all his troubles, when the hæmorrhage would naturally cease" (*ibid*, p 214, ll 34-36)

Was he attacking the "cause" by his stomach-soothing mixtures? One feels sorry for a physician of such eminence as Calvert reducing himself to this level!

It may be stated that in view of Calvert's evidence and of Dr Ashutosh Das Gupta's statement in the Sripur case to the effect that in the early hours of the morning of the 8th May, the Kumar's pain in the abdomen increased and Calvert was at once sent for, probably through Mukunda (Ex 394, Vol III, p 19, ll 16-19), a statement which was put to him in this case (Vol 16, p 253, ll 25-31), Mr Chatterjee made a suggestion in this court that this prescription, Ex 51 (c), must have been obtained from Calvert from his house and had not been made by him after seeing the patient But having regard to the fact that the suggestion was not put to

Calvert in cross-examination, I am not sure that Mr. Chatterjee is entitled to make any such case

Major Thomas thinks that *Ex 51 (e)*, like the Spt Ammonia mixture (*Ex 51*), Calvert's first prescription, was for the treatment of dyspepsia. It contains sodium bicarbonate which he says might have been given to neutralise acidity or to relieve sickness, nausea or vomiting. The prescription, in his opinion, did not indicate a highly irritated stomach (*Vol 12, p 341, l 35—p 342, l 11*). He agrees with Calvert rather half-heartedly that this prescription is suitable for acidity of the stomach, pain in the stomach, vomiting, diarrhoea and tenesmus. He says that it is "a very weak mixture", "on the whole it tends that way", "it is much too weak for tenesmus". He adds that he does not doubt the sincerity of Calvert's conviction that it would be suitable for these (*ibid, p 349, ll 4-10*).

Col Denham White is simply asked in examination-in-chief if it is a suitable medicine for an interval of biliary colic. He answers "I think it would be sedative to the stomach" (*Vol 17, p 158, ll 28-29*). As already stated, he calls this and *Ex 51* "commoner garden medicines", and admits that they are not prescribed only in intervals of biliary colic (*ibid, p 166, ll 32-33*).

Col MacGilchrist very clearly explains the effect of the various ingredients of this prescription. He agrees with Calvert to the extent that it is suitable for acidity, pain in the stomach and vomiting, but says it is not so far diarrhoea and tenesmus (*Vol 9, p 343, ll 39-41*). The dose of bismuth carb is very small and it is entirely for the stomach. Pulv Tragacanth Co is only a sweetening and supporting agent to keep bismuth in suspension. The cayputi and peppermint water are volatile oils which are sedatives and prevent spasm of the stomach. Bismuth carb is insoluble and forms a mechanical coating inside the stomach which it thus protects from irritation. The magnesium carbonate and sodium bicarbonate neutralise the acids in the stomach and so prevent irritation from the acids. He would not prescribe this medicine for biliary colic (*ibid, p 344, ll 1-15*). In cross-examination he says that bismuth carb is given in mild diarrhoea but in enlarged doses. In 10 gram doses it will not be sufficient even to coat the lining of the stomach. Supposing tenesmus was present, and the medicine relieved the stomach, he thinks it would be wholly ineffective to lessen the tenesmus (*ibid, p 357, l 34—p 358, l 10*).

Dr Bradley's evidence is to the same effect. He does not believe that this prescription will have the slightest effect on vomiting and diarrhoea, but may have some effect on acidity, so far as 10 grs of sodi bicarb goes. The two oils, oil of cayputi and peppermint water, would tend to relieve spasms a bit, but the dose in every case is much too small to be of any use in anything severe. Bismuth carbonate is supposed to coat the mucus membrane of the stomach and thus to protect it from irritation, but 10 grs would not go very far (*Vol 11, p 348, l 36—p 349, l 8*). The prescription is for indigestion, but it does not indicate anything very serious. If a doctor says that in cases of biliary colic he prescribed *Exs 51* and *51 (e)* for the intervals, the witness would not agree (*ibid, p 353, ll 18-20*). In cross-examination he says that *Ex 51 (e)* is a carminative, entirely sedative, but not a stimulant. Asked if sodi bicarb in the prescription might have been given to counteract vomiting or vomiting tendency, he says that 10 grs dose in itself would not prevent it, but the prescription taken as a whole would help, if retained (*ibid, p 364, ll 21-26*).

The learned judge, it appears again, has given a correct summary of the medical opinions on this prescription, which will be found in *Vol 18, p 341, ll 30-40*

(4) *Re Prescription No 4 (8th May)—Ex 51 (b)*
(*Vol. 1, p 279*)

This is a prescription by Dr Nibaran Chandra Sen, and there are four different items in it. The last one, as already pointed out, is not a prescription proper (*Vol 9, p 347, ll 14-15*), but, in the language of Mr Chaudhuri, an "armoury" of several drugs to be used independently. Dr Sen being dead, his opinion is not available.

As regards items (i), (ii) and (iii), it is generally agreed that these are mere aids to digestion.

Thus Calvert says that (i) is for assisting digestion of milk, and (ii) should assist digestion and may be used to correct irregularities arising from morbid and irritating conditions of the stomach (*Vol 2, p 216, ll 13-18*).

Major Thomas says likewise that (i) is added to milk to make it more easily digestible, and (ii) also is to aid digestion both would be suitable for intervals of biliary colic (*Vol 12, p 342, ll 14-17*). As regards item (iii), Pep Powder fresh, he does not understand what it means, and there is no dosage here (*ibid, p 342, ll 25-26*).

Col Denham White was not asked anything about this prescription.

Col MacGilchrist says that both (i) and (ii) should go together both are for purely gastric indigestion and would not be prescribed in a case of impacted gall-stone. Citrate, he explains, is usually added to milk to form a fine curd instead of a coarse curd, and pepsin is a substance which the stomach produces to digest protein and is given as an aid to the stomach to perform its normal duty (*Vol 9, p 346, ll 1-6*).

Dr Bradley gives the same opinion. Item (i) is to provide easily assimilated food—usually given in gastric irritation, and item (ii) is also to aid gastric digestion. Nobody will prescribe either in a case of impacted gall-stone, unless by coincidence the patient has severe indigestion, but it is not a treatment of gall-stone. There is no cross-examination on this.

None of the doctors is asked if the soda citrate with milk or the pepsin could be given to a patient in a state of collapse.

As regards the "armoury", Col Calvert agrees that the first three items in it, "Atropine Tab", "Strychnine Tab" and "Digitals Tab" are cardiac stimulants (*Vol 2, p 222, ll 3-5*).

The only other evidence on this is that of Col MacGilchrist. In examination-in-chief he gives a fairly full explanation of the use and action of the different items. Atropine tablets, gr 1/100 each, are used usually for hypodermic injection combined with morphia tablets, the object of atropine being to protect the heart against the action of morphia. Morphia is used to alleviate pain due to whatever cause, and such pain, he admits, usually occurs in biliary colic also. As regards the strychnine tablets, 1/30th of a grain, he says it is a very big dose, specially for hypodermic injection, and particularly after the quinine and arsenic pills. The dose by the mouth is 1/64th to 1/16th of a grain, and a hypodermic dose would be much smaller. Action—stimulant of the nervous system. The quinine and arsenic pills in *Ex 51 (a)* contained strychnine, and 12 pills contained almost a fatal dose.

The point is that strychnine here in this prescription, item (iv) of *Ex 51 (b)*, is a very large dose. *Digitalis* tablets, 1/100th gr, are for hypodermic injection, the action is entirely heart-stimulant. Either pure, half an ounce, by hypodermic injection, would be a suitable medicine for collapse. By inhalation, just as chloroform, it will relieve convulsions and spasms. He points out that no directions are given in this list of drugs as to how they are to be administered, or how many are to be supplied. It only gives the dose of each (*Vol 9, p 350, l 30—p 351, l 12*). In cross-examination this is what Mr Chaudhuri put to the witness—

"Q—Would this (*sic*) right in getting these tablets for an emergency?

A—Yes

Q—To provide against collapse or to treat a collapse?

A—Yes, some of them

Q—Take the item "strychnine tablet" A doctor using hypodermic syringe could use one half of that?

A—Yes" (*ibid, p 360, ll 6-12*)

(5) *Re Prescription No 5 (8th May)—Ex 51 (c)*
(*Vol I, p 281*)

This is Calvert's third and last prescription and contains two medicines, (i) a spirit ether mixture, and (ii) opium pills. According to the doctors, the first is for collapse, and the second is said by the defendants' witnesses to be a substitute for morphia injection, while the plaintiff's doctors say that it is a medicine to check diarrhoea.

Calvert admits that item (i) is a stimulant mixture given when collapse commences. As regards item (ii), it was put to him if it was a medicine for stopping hæmorrhage he first tried to avoid an answer by saying that in this particular case the hæmorrhage as hæmorrhage was of little significance except as pointing to the danger within, and then on the question being repeated, said—

"A—Yes it was—for if retained, it would check the spasm and relieve the cause of the hæmorrhage which would then cease of itself."

He did not agree that opium being a cardiac depressant was contra-indicated in case of collapse (*Vol 2, p 214, ll 17-30*). Later, on being questioned whether any of the medicines in his three prescriptions were prescribed for the paroxysm in biliary colic, he wanted to convey that the stimulant ether mixture and the opium pills were given as "substitutes for the real treatment" (*ibid, p 215, ll 32-35*). He was asked if he had any authority for saying this, and if he thought that this medicine taken by the mouth could remove the stone. His answer was

"A—I have previously stated that I am not aware of any medicine which would remove gall-stones. For this a surgical operation is necessary. No doubt, we hoped, and that is the utmost we could hope for, that the stone would disengage itself and pass onwards or backwards into the gall bladder with the subsidence of the colic" (*ibid, p 216, ll 1-11*)

In re-examination he tried to explain that by "the real treatment" he meant morphia administered hypodermically, as under such administration one was certain the patient received the full dose of morphia (*ibid, p 223*,

ll 32-37). Earlier, he said in cross-examination that the prominent symptom in an attack of biliary colic for the relief of which treatment was indicated was pain, and the drug indicated opium, and he referred to opium being given to the Kumar by this prescription. It was put to him on the authority of Burney Yeo (which he was prepared to accept as good authority on biliary colic in 1909), that morphia and opium had the effect of diminishing the flow of bile, and that therefore in such cases chloroform inhalation was better or hydrate of chloral given per rectum. He agreed with the statement as to the action of opium on bile secretion, but said that when a fatal issue was at stake, the secretion more or less of a few drops of bile was a matter of indifference (*ibid*, p 218, ll 8-29).

The effect of Calvert's evidence seems to be this the spirit ether mixture is a stimulant for collapse, while the "Ext Opu" pills is a substitute treatment for paroxysm in biliary colic, which by checking the spasm might relieve the cause of hæmorrhage. Opium might no doubt affect the secretion of bile or depress the heart in a state of collapse, but in extreme cases risks must be taken.

According to Major Thomas, this prescription indicates faintness or collapse, but not necessarily that it is severe. The first medicine in it has nothing to do with diarrhoea, while the second may or may not be given to treat diarrhoea, but there is no indication of profuse diarrhoea (*Vol 12, p 341, ll 19-28*). Item (u) in this prescription could be given instead of morphia and atropine in injection.

In cross-examination he tried to resist the suggestion that "Extract Opu" is given to check diarrhoea —

Q — Kindly look to the second prescription on it, Ext Opu and so forth. Do you know that Extract Opu is given to check diarrhoea among other things?

A — It might be given, but I do not think it is feasible.

Q — Belladonna — would that have the effect of checking tenesmus?

A — It might.

I am very familiar with Hale White's *Materna Medica*. I agree with this.

'Opium is invaluable for stopping many varieties of diarrhoea', but I would use it for a temporary purpose, such as going to pictures. In other words, it is a most unscientific way of stopping diarrhoea.

Q — Was that opinion in vogue in 1909?

A — I cannot say what the opinion was in 1909, but I am inclined to think that it was "the same, as the principle is that in diarrhoea you do not stop but eliminate" (*ibid*, p 349, ll 14-27).

As regards item (i), he agrees with Calvert that it is a stimulant given when collapse commences, but adds that it might be given in other conditions also: what the "other conditions" are, he was not asked in re-examination to explain (*ibid*, p 349, ll 28-30).

Col Denham White also said that item (i) in *Ex 51(c)* does not indicate diarrhoea at all (*Vol 17, p 158, ll 13-15*). As regards item (u), it was given to relieve straining at stool or griping, and if the patient refused hypodermic injection for pain of biliary colic, it would be a substitute only as a second best (*ibid*, p 159, ll 1-4).

Col MacGilchrist says that the Spirit Ether mixture is a prescription for collapse, for a failing heart, and represents a later stage of the treatment than Calvert's previous prescription, *Ex 51(e)*—(the mag carb mixture) (*Vol 9, p 345, ll 33-34*). The Ext Opi pills, in his opinion, probably indicate that they were given to check diarrhoea and tenesmus or griping (*ibid, p 344, ll 23-24*).

Dr Bradley is quite definite that item (i) is for collapse, and item (u) would be given to control severe diarrhoea. Taking the two prescriptions together, his idea is that the diarrhoea was so extreme as to produce collapse, or the condition which called for the second prescription on *Ex 51(c)* would indicate that the patient had collapsed as the result of diarrhoea, or the loss of fluid as in cholera. The condition indicated by the second prescription is the cause of the collapse. He noticed from the druggists' serial numbers that between the time of *Ex 51(e)*—Calvert's mag carb mixture—and this prescription, the chemist had only put up three other prescriptions, so that the collapse must have occurred fairly soon after writing up *Ex 51(e)*, assuming that the chemist had a busy day (*Vol 11, p 349, ll 14-30*). He would not prescribe either this or any of the other two prescriptions of Calvert for intervals in biliary colic (*ibid, p 352, ll 36-37*). In cross-examination he stated that the ingredients in the first prescription did not indicate any bowel condition at all (*ibid, p 363, ll 36-37*). He was further asked, supposing the patient had refused hypodermic injection and he had pain, if it would be reasonable to prescribe this opium and belladonna, and he said, "logically it would be" (*ibid, p 364, ll 31-35*).

The learned judge has again correctly summarised the evidence on this prescription in *Vol 18, p 342, ll 18-28*.

(6) *Re Prescription No 6 (8th May)—Ex 51(d)*,
(*Vol I, p 283*) ..

This is the very last prescription for the second Kumar and is by Dr Nibaran Chandra Sen, containing three items. The first appears to be a liniment of soap and mustard, to be rubbed all over the body with ginger powder. The second is a liniment of chloroform and belladonna with directions to be applied over the stomach. The third is not a medicine, but a kind of cloth inter-woven with small pieces of sponge, rendered water-proof on one side, which when moistened with water is used as a poultice.

Calvert was asked if item (i) was for collapse and comatose condition, and he said this was an endeavour to restore a failing circulation. As for item (u), it was a medicine to relieve any local pain, and it was probably given to relieve pain of the stomach, as these were the directions in the prescription (*Vol 2, p 216, ll 20-25*).

Major Thomas is of opinion that the "lint saponis" prescription does not necessarily indicate muscle cramps, and by no means indicates that the patient must have been suffering from arsenic poisoning. Asked if it is commonly used in cholera cases, his answer is that he does not see why it should be, though he can imagine it is possible to use it for rubbing the limbs in cholera (*Vol 12, p 342, l 28—p 343, l 4*). As regards the chloroform belladonna liniment, he thinks that if the case was one of biliary colic, it might have been applied or rubbed in the abdomen to relieve pain. The third thing in the prescription is spongiopiline, being just an absorbent to apply a liniment over a skin surface (*ibid, p 343, ll 8-15*).

Col Denham White said in examination-in-chief that the liniment containing ginger powder was prescribed to relieve cramps or to increase warmth

of the limbs. Occasionally he had cholera patients' rubbed with ginger, but cramps occurred also in biliary colic, and in support of this statement he cited a passage from Sajon which runs thus — "Two cases suffered from cramps, which were probably connected with disturbance in the celiac ganglia and the abdominal sympathetic." He took it that these were cases after successful operation, but said that the point was rather obscure (*Vol 17, p 159, ll 16-19 and ll 5-13*)

Col MacGilchrist says that item (1) is generally used, in cholera for cramps of the muscles of the legs. Such cramps occur also in acute arsenical poisoning, and are due to loss of fluid from the body. He does not think anybody would ever prescribe it in gall-stone, there is no loss of fluid in gall-stone to cause cramps (*Vol 9, p 346, ll 9-15*). In cross-examination he repeats that this prescription is not for collapse but for cramps, and is typically used for cholera cramps. Cramps do not occur after a shock, but only in case of loss of fluids, they are due to the fact that the muscles are de-hydrated (*ibid, p 360, ll 14-19*). As regards item (11), he says it would be useful in pain on the stomach, which and the rectum are the two parts specially irritated and inflamed by arsenic. This also he would not prescribe in gall-stone, in which the stomach is practically unaffected. In biliary colic, he points out, the pain is in the right hypochondrium, that is, in the region below the ribs on the right side. The pain of biliary colic radiates towards the back and the right shoulder, and is not over the region of the stomach (*ibid, p 346, ll 17-32 and p 358, ll 11-21*). He was asked in cross-examination if in biliary colic it would be wrong to apply a liniment over the stomach, and his answer was as follows —

"A — Yes, the liniment should be over the right hypochondrium. I would write on the prescription "To be applied on the right hypochondrium", if necessary, and I would show the part to the relatives and mark it, if no doctor is present, and after explaining, would write "to be applied as directed" in the prescription.

It would be wrong to say "to be applied over the stomach", even if an attending physician is present."

The third item in the prescription, spongiopiline, he explains, is something like felt, but white, used by surgeons, usually for hot fomentations, soaking it in hot water, and applying it to the painful part, and covered over with waterproof sheets to prolong its action as a fomentation (*ibid, p 347, ll 8-11*).

Dr Bradley says that the first prescription is for cramps in limbs — commonly used in cases of cholera, and the second is for pain and discomfort in the stomach. He would not prescribe either in a case of impacted gall-stone (*Vol 11, p 350, ll 30-36*). In cross-examination it is put to him that this prescription is used to restore circulation, when any massage is required to be done for the purpose, and he says that it is given to relieve the contraction and painful spasm in cholera. He does not suggest that because there was this prescription, there must have been symptoms of cholera, but he adheres to the statement that it is a prescription commonly used in cholera (*ibid, p 364, ll 5-15*). He agrees that the chloroform and belladonna prescription is a proper one for relieving pain in the stomach (*ibid, p 365, ll 1-2*).

The learned judge's summary of the evidence regarding this prescription also appears to be fairly correct. (*Vol 18, p. 342, l 29—p. 343, l 16*).

STORY OF POISONING—HOW FAR A MATERIAL PART OF PLAINTIFF'S CASE

Having regard to the divergent cases made by the parties,—biliary colic on the one hand and arsenic poisoning on the other,—I feel bound to repeat that the prescriptions produced by the plaintiff, which were admittedly all the prescriptions made for the second Kumar, cannot but be of the utmost significance, and these must doubtless be read with the telegrams, copies whereof were again produced on behalf of the plaintiff. In one sense the question as to what the Kumar died or was taken to have died of, may be said to be immaterial, except perhaps in so far as it may affect the probability of the story told on one side or the other. In other words, while on the one hand the chances of a patient passing into a condition which may easily be mistaken for death may be supposed to be less in a case of biliary colic than in that of arsenical poisoning, it may be said, on the other, that a patient having had a collapse on account of arsenic poisoning is more likely to recover from the action of rain and open air than one suffering from biliary colic. Counsel for the plaintiff in fact put the following question to Col MacGilchrist —

"Q—Suppose the patient had a collapse on account of arsenic poisoning and his body had been removed to the cremation ground and all this in Darjeeling, fully covered up from head to foot, could open air and a touch of rain bring him back to consciousness?

A—If the dose was not fatal, time alone would do so. It is only a matter of time" (*Vol 9, p 347, ll 20-25*)

It does not appear that there was any cross-examination on this point. Dr Bradley was similarly asked if open air or the touch of rain would have the effect of reviving a patient who had had a collapse on account of arsenical poisoning, and his answer also was, "Not of itself. Time, if it was not a fatal dose, would revive him" (*Vol 11, p 354, ll 29-33*). I do not find any cross-examination of this witness either on this part of his evidence.

Mr Chandhuri suggested before us that the story of arsenic poisoning was an invention of the plaintiff made for a definite purpose, namely, to account for the presence of a cyst under his tongue and explain away his defective and halting manner of speaking Bengali, and above all, to furnish a basis for his case of alleged loss of memory. As regards the cyst and the alleged difficulty of speech, Mr Bankim Mukherji, junior counsel on behalf of the plaintiff, stated to us (on the 15th December, 1938) that the plaintiff would not make the case that any difficulty of speech or any lesion or morbid condition of the tongue was caused by or resulted from any administration of poison. Whether any inference should be drawn against the plaintiff from the fact that he was abandoning in this court a case he is supposed to have made at the trial is another matter, but this shows quite clearly that neither the cyst nor the impediment in speech was a circumstance which necessitated a false case of poisoning being made. So far as loss of memory is concerned, Mr Chaudhuri admitted that in the present imperfect state of scientific knowledge on the subject it could not be asserted with confidence that such a phenomenon was theoretically impossible. The only question was whether the alleged loss of memory was or was not a fact, however it might have been caused. Personally speaking, I am not at all satisfied that it was essential for the plaintiff to have made a story of arsenical poisoning, if it was not a fact, in order to bolster up any material part of his case.

Nor am I prepared to accept the other suggestion that the story of poisoning was an after-thought on the part of the plaintiff. In the plaint, it will be observed, the plaintiff made a definite allegation of administration of poison in the course of his treatment at Darjeeling, and further stated that as a result thereof, "his memory of the past was almost effaced" (*Vol I, p 120, paragraph 2*). In his memorial, to the Board of Revenue, *Ex J*, (*Vol III, p 92*), he did not expressly mention poisoning as the cause of his suspected death, but merely referred to the fact of his being carried to the cremation ground when life was not yet extinct, and to his body being picked up from there and carried away by some sannyasis, and he also alleged "a complete forgetfulness" for some time "of everything connected with the previous years of his life owing to this crisis in his life" (*paragraph 7*). Later on, however, speaking of his being recognised by his relations and others as the second Kumar on his return to Jaidebpur, notwithstanding that his voice was "affected", he definitely stated that this defect in the tongue was due to arsenic poison at Darjeeling (*paragraph 14*). The defendants' own evidence shows that the story of poisoning was actually in circulation at Jaidebpur from quite an early stage after the declaration of identity by the plaintiff, and this will appear also from the proceedings in the Defamation Case of 1921 in which this story was largely canvassed. As is pointed out in the judgment of the High Court in this case, *Emperor v Purna Chandra Ghose*, (28 C W N 579 at p 583), the trying Magistrate, as a result of considering the prescriptions given for the treatment of the Kumar, came to the conclusion that none of the prescriptions were for biliary colic, and after considering the Kumar's symptoms, he diagnosed these as symptoms of arsenical poisoning resulting from some medicine which he concluded from the evidence had been prescribed and given to the Kumar by the complainant Dr Ashutosh Das Gupta. If it be supposed that this was a false story first started at that time and was the origin of the case which the plaintiff afterwards came to make, there is no explanation forthcoming as to how the plaintiff could have derived sufficient knowledge or information of the events at Darjeeling at this stage to be able to concoct such a story which was not only plausible but even possible.

For the purpose of discrediting the plaintiff's case of poisoning, Mr Chaudhuri relied upon his cross-examination of the plaintiff on the point which may be set out in full

"Q—When did you know you were poisoned?

A—I never mentioned poison. Doctors said that arsenic poisoning may have such effects. Thus I heard after my arrival at Dacca. I do not remember in what month or year.

Q—You do not want to say that anybody tried to kill you by poison?

A—I can't say. I do not know. I can't name a single doctor who told me about the effects of arsenic. From the state of my body I can conjecture what had happened—that there was an attempt to poison me and kill me. The sannyasis did not tell me. They did not give me an emetic to make me vomit it out. I told this to nobody. I did not tell this to Jyotirmoyee. If anybody says that I said so, he is wrong. No witness on my side said that poison had burnt my tongue. I told nobody that poison had burnt my tongue. The sannyasis did not tell me so. Nobody told me what poison it was.

Q—You know "arsenic"?

A—It is a poison

I did not see the prescriptions made for me I did not tell anybody that I spat out the poison and it burnt somebody's cloth I did not spit out the poison The word "arsenic" is English Its Bengali is *bish* I can't say what *bish* I do not know *shankha* (white arsenic) or *sheko bish* (arsenic poison)

Q—Do you know that arsenic does not burn?

A—No

Q—It produces no burning sensation in the chest?

A—I don't know

Q—Directly you took the medicine, your chest burnt?

A—Can't say

I got restless after taking it, and my chest burned and I grew restless I got these a little after My chest burned first, and then I got restless and I said "Ashu, what have you given me?"

Q—Did you tell anybody that poison altered your voice?

A—Thus I understand myself, but I did not say that in the memorial",
(Vol 4, p. 161, l 21—p. 162, l 17)

Further on—

"Next day (i.e. 7th May) I was not so (i.e. unconscious), but at night Ashu doctor gave me medicine and I felt the burning sensation in the chest three or four hours after and said "Ashu, what have you given me?" Next day I had blood stools and after that I became unconscious When I got the burning sensation I felt vomiting tendency and I screamed and I said "Ashu, what have you given me?" Next day, as I said, I had blood stools" (ibid, p 170, ll 8-13)

Again,

"I noticed the noddle underneath my tongue when I regained consciousness Directly I talked to people and felt my tongue was heavy I talk as usual, but there is *atka atka* (a certain impediment) The *sur* (tone) is not distinct I felt that my tongue was heavy I did not feel any difference in pronunciation or voice" (ibid, p 171, ll 8-14)

The plaintiff's statement in examination-in-chief may be also given in full —

"At Darjeeling I was keeping well Then I got ill I got ill 14 or 15 days after my arrival at Darjeeling It commenced by my having flatulence at night It was towards the end of the night I spoke to Ashu doctor then about it—that night In the morning he brought a European doctor He prescribed a medicine I took it that day (6th May) Next day also I took it, it did me no good Then at night—(when read over, adds 'at 8 or 9 P.M.')—Ashu doctor gave me a medicine He gave it in a glass (shows a small glass) It did me no good As I took it my "chest" burned and I grew restless These symptoms appeared 3 or 4 hours after I took the medicine And I began to scream (*chhikkur parit*

laglam, a Bhowal Bengali expression). No doctor came that night. Next morning (8th May) I passed blood stools—the motions were in quick succession. My body got feebler. Then I got unconscious. I do not know whether any doctor came to me, till that moment.

What happened after I became unconscious I do not know”
(*ibid.*, p. 101, ll. 13-27)

Speaking for myself, I do not see anything in the plaintiff's cross-examination which at all tends to shake the account he gives. The account stands as a simple and consistent story with no inherent improbability in it and with no attempt to embroider it with false details, which he could not speak to from personal knowledge. It gives his present recollection of facts which were within his own experience up to the moment he lost consciousness. He describes the symptoms as they occurred, without seeing the prescriptions. He suspects poisoning, but this is only a conjecture from the state of his body. Quite honestly he says he was not in a position to assert that anybody tried to kill him by poison. He never mentioned poison, which means, he never complained of poison at the time Dr Ashu gave him the potion which produced the effects he describes. Much less did he mention arsenic himself, but only learnt from doctors afterwards that arsenic poisoning might have such effects. He cannot name any of the doctors who told him so, nor does he remember in what month or year he heard it, but that does not mean that his statement must be false. He told nobody that poison had burnt his tongue or that he had spat it out. He does not know that “arsenic does not burn,” nor that it “produces no burning sensation in the chest.” He is content merely to state that his chest did burn, and he got restless as well, and vomited, and that he screamed in pain, but no doctors came, — a fact which, as will be seen later, received unexpected confirmation from Satyendranath Banerjee himself, as also from Dr. Ashutosh Das Gupta, though this had to be wrung out of them after strenuous resistance on their part.

Mr Chaudhuri suggested, before us that the first case which the plaintiff made regarding the poison was that it was a corrosive poison, and that this case persisted, right through till the plaintiff came into the box, when Mr Chaudhuri for the first time put it to him, that arsenic was a metallic poison and could not corrode. After this, he said, that case was dropped. There is obviously nothing in this point. Whether arsenic does or does not burn, the fact is incontrovertible that from the first moment a case of poisoning was made, it was poisoning by arsenic. Mr Chaudhuri referred to the evidence of some witnesses, on the plaintiff's side who were examined before the plaintiff himself and who no doubt told a story of a poison which had produced marks of burning on the cloth and the skin of one Sarif Khan, an up-country Muhammadan orderly of the Bhowal Raj, who had admittedly gone to Darjeeling with the second Kumar. It will be seen, however, that these witnesses did not purport to give the version of the plaintiff, but merely related a story which they heard or overheard Sarif Khan narrating to some other persons,—neither Sarif Khan nor any of these persons having been called as witnesses in the case.

The first of such witnesses is Ananta Kumari Devi, brother's widow of Akshoy Roy, the man who is said to have been sent out in quest of the second Kumar, and one of the earliest witnesses of the plaintiff to be examined on commission (Vol. 1, pp. 464-504). She says that, shortly after the return of the Darjeeling party to Jaidebpur, she overheard a conversation between

her husband and Sarif Khan, in the course of which Sarif Khan is supposed to have told a story which is thus recorded in the evidence —

"A poison or something like that was administered to Mejo Karta (meaning the second Kumar), saliva began to ooze out of his mouth; just see it had fallen on my cloth please look here, my cloth has been burnt, a blister has formed on my thigh by its falling upon it; saying thus, he showed a burnt place in the cloth and the blister"

The witness adds—

"I also saw that from a place outside their view"
(*ibid*, p 471, ll 24-28)

She elaborates the story in cross-examination (*ibid*, p 491, ll 9-34)

The next witness is Mokshada Sundari Devi, mother of two of defendants' important witnesses, Saibahini (on commission) and Phani Bhusan Banerjee, D W 92, who reports a similar conversation of Sarif Khan with Rani Satyabhama Devi. This is the account she gives of what Sarif Khan told the Rani —

"Satya Banerjee was present there. Ashu doctor administered the medicine to him some portion of the medicine the second Kumar took and some portion he sputtered away with this sputtering of the medicine the Kumar said, 'What have you administered? What have you administered?' Some portion of that medicine fell on the Kumar's bed, and as Sarif Khan was in front of it, some portion fell on the cloth he was wearing and on his garment"

The witness adds, "Sarif Khan showed his cloth and garment which seemed to bear marks of scorching at places" (*Vol 2, p 11, ll 22-30*). She speaks only about stains on Sarif Khan's cloth, and not of any marks of scorching on his skin.

Another witness of the plaintiff, also examined on commission, referred to in this connection, is Satya Dhenu Ghosal, a barrister-at-law and a member of the Calcutta Bar, whom Mr Chaudhuri spared by saying that he was not a lying, but only a "partisan" witness. His evidence is that the plaintiff told him that he had been poisoned and that was how he had come by the injury to his tongue.

"Q —Do you mean that in order to eradicate the poison somebody had to perform a surgical operation on his tongue?"

A —He said that the injury came to be there due to poison, there was no operation.

Q —That is, that the poison itself, by its action had corroded his tongue?

A —I suppose he meant that when he said that it was due to poison.

Q —You understood from what he said that the action of the poison on his tongue had caused this injury?

A —Yes, I understand that from what he said "
(*Vol 4, p 9, ll 6-18*)

This is not evidence that the plaintiff had told the witness that his tongue had been corroded by the poison, but is only the witness's interpretation of what the plaintiff had told him.

The next witness is Surendra Mohan Adhikari, P W 2, who says that on his asking the plaintiff why his speech was indistinct, the plaintiff said. "Some medicine was administered to me and that is how my tongue is like this" From his impression of what the plaintiff said, the witness could not say that if any of the other witnesses of the plaintiff had said that the plaintiff's tongue was corroded as the result of the poison, it would be untrue (Vol 4, p 35, ll 34-41) Another witness mentioned by Mr Chaudhuri, Radhika Mohan Goswami, P W 4, merely says "I heard it said that poison had thickened his tongue" (Vol 4, p 51, l 3)

One really fails to understand how on the strength of this evidence it is possible to discredit the plaintiff's story of arsenical poisoning, on the ground that he had made a different case earlier. There is absolutely nothing in the statements of the witnesses referred to by Mr Chaudhuri which shows that the plaintiff had told any of them about a corrosive poison. I am not sure that the tale said to have been told by Sarif Khan is evidence at all in any case I should not be prepared to accept this as a part of the plaintiff's case merely because the story is repeated through the mouth of some of his witnesses. It is perfectly clear, in any view, that there is no basis for the suggestion that Mr Chaudhuri by his cross-examination caused a change in the plaintiff's case, for, before Mr Chaudhuri put it to him that arsenic was a non-corrosive poison, he had in fact already denied having told anybody that poison had burnt his tongue. I may perhaps add what is only common sense to suppose that if the plaintiff was minded to make a false case, this would be all the more a reason for his adhering to a uniform story throughout.

It may be pointed out in this connection that Jyotirmoyee Devi in her cross-examination said —

"I did not hear of the name of the poison. It is not a fact that we invented the story of Sarif Khan and of arsenic" (Vol 8, p 365, ll 29-30),

upon which Mr Chaudhuri put her a question which, as I read it, really implies that arsenic was the original story,—quite the contrary of his present suggestions.

"Q—And having now grasped that arsenic does not burn or injure the tissues, you are now giving up that tale?

A—It is not true" (*ibid*, ll 31-33)

In any event, it seems to me unthinkable, having regard to the fact that arsenic poisoning had been definitely alleged in the Defamation Case, that the plaintiff, though, as I hold, he cannot be made responsible for all that the defence might have said in that case, should be making a different case in the present suit, particularly as he seeks to rely so strongly on the very prescriptions on which the charge of poisoning was based in that prosecution.

CYST ON THE TONGUE

I might perhaps add a few words here regarding the cyst. It is admitted that the second Kumar had none, while the plaintiff has a small growth of about the size of a split pea under the tongue. Mr Chaudhuri referred to the evidence of two of plaintiff's earlier witnesses to show that the case at that stage was that this growth had been caused by poison. One of these witnesses is Surendra Mohan Adhikari, P W 2, already referred to, who merely stated — "I asked him (plaintiff) why his speech was indistinct. Plaintiff

said "Some medicine was administered to me and that is how my tongue is like this" (Vol 4, p 35, ll 33-35) There is nothing said about the cyst. The other witness is Begim Behari Chakrabarty, PW 1, from whom Mr Chaudhuri elicited, only this in cross-examination —

"Q—He (plaintiff) said that this difficulty of speech was due to the fact that he was poisoned?"

A—Yes, he said so

He said that poison had numbed the tongue. He did not say whether the poison had burnt his tongue. I did not hear that the poison had produced a tumour. He said that the poison had thickened the tongue" (Vol 4, p 30, ll 8-14)

Here, again, there is no statement that the cyst had been caused by the administration of poison. Plaintiff's own evidence on the point has been already quoted, which is to the effect that he noticed a nodule underneath his tongue when he regained consciousness and felt that his tongue was heavy (Vol 4, p 171, ll 8-9 and 11-13). Col MacGilchrist was merely asked in cross-examination about the possible period of growth of this tumour, and he suggested that if it was a gumma, it might take two or three weeks, but if it was cystic, which probably it was, it would take 5 or 10 years (Vol 9, p 360, l 26—p 361, l 8). His statement in examination-in-chief was that a growth like this would affect speech and affect tone also (ibid, p 350, ll 6-7). Dr Bradley, again, simply stated that the cyst would affect articulation, but not voice sufficiently (Vol 11, p 354, l 28). In this state of the evidence, it seems doubtful if the plaintiff can be said to have made a definite case ascribing the growth of the cyst to poisoning, but in view of the statement already referred to, made by Mr Chatterjee's learned junior on behalf of the plaintiff, it is perhaps not necessary to pursue the matter further. The plaintiff's case still remains that the cyst, however it might have been caused, is certainly one of the factors which account for the plaintiff's "speech disorder". It is necessary only to call attention to the part of the judgment where the learned judge deals with the matter (Vol 18, p 416, ll 20-40).

1 NATURE AND COURSE OF ILLNESS

I may pass on now to a consideration of the first of the topics in the Darjeeling chapter I have indicated, namely, the nature and course of the second Kumar's illness.

The difficulty of arriving at a certain conclusion on the subject need not be minimised, having regard specially to the long lapse of time which has supervened. Fortunately, a few contemporaneous documents have been preserved, which should doubtless be of great value so far as they go, but it so happens that they do not all speak with the same voice, and an attempt to reconcile them with the case of one party or the other is by no means an easy task. It is indeed not without significance that while the defendants seek to rely mainly on Calvert's condolence letter of the 10th May, 1909 and his death certificate of the 7th July, 1909, the plaintiff should take his stand on the telegrams and prescriptions and also on the letter which Calvert wrote to Lindsay on the 3rd August, 1921, a letter which, as already pointed out, was admittedly in the defendants' possession, and was actually shown by them to Calvert before he came to depose, but which they would still not produce during the examination of the witness. As regards the oral

evidence, the plaintiff has only his own testimony to rely on, and he relies on it, whereas the defendants have examined a number of witnesses, but would jettison a great deal of this evidence themselves. Thus body of evidence, however, is there, and if the defendants have chosen to put into the box witnesses whose statements they are not prepared to accept, that is undoubtedly a fact which the court will be bound to take into account in trying to arrive at its conclusions. Besides two of the doctors who treated the Kumar, Col Calvert, the consultant, and Dr Ashutosh Das Gupta, the attending physician, the defendants' witnesses include Bibhabati Devi herself, her brother Satyendranath Banerjee, Bepin Behari De, the khansama, Birendra Chandra Banerjee, the personal clerk and alleged relation of the Kumar, Anthony Morel, the Indian Christian employee, Shyamadas Banerjee, a cousin of Satyendra, and Jagat Mohini, the nurse, who attended only on the last day of the illness

Mr Chaudhuri urged before us with great force, as he had done in the court below, that the attending physicians were the best persons to speak with authority on the symptoms of the patient, and he should, therefore, have no right to complain, if the plaintiff sought to rely on the evidence of Col Calvert or Dr Ashutosh Das Gupta in support of his case on matters on which he had no substantive evidence of his own to offer. Paradoxical as it may seem to be, the fact remains that the plaintiff's case as regards the nature and course of the illness rests very largely on the evidence of the defendants, and in proof of certain material facts Mr Chatterjee has, in particular, called in aid the statements of Dr Ashutosh Das Gupta, as I think he was entitled to do. He was a witness who was deliberately trying to keep back the truth, and if such a witness, said Mr Chatterjee, was forced to make certain admissions under the pressure of cross-examination, these certainly constituted the most valuable evidence in the plaintiff's favour, and this could not be discarded simply by saying, as Mr Chaudhuri wanted to say, that it was the evidence of an unreliable person. Mr Chaudhuri's apology for this witness may be given in his own words. Dr Ashu, he says, "was cross-examined four times here but three times before he had no case diary, the prescriptions were shown to him for the first time after 13 years in cross-examination, he had not seen the telegrams and he was cross-examined regarding the course of illness practically from hour to hour. His answer should have been that he had forgotten, but there is a class of 'foolish' witnesses who try to remember everything. This is how the witness has made some mistakes." Mr Chaudhuri has no doubt tried to put the best face he could on the evidence of Dr Das Gupta, but this is evidence which is a typical illustration of the dictum of Daniel Webster—falsehoods, not only disagree with truths, but usually quarrel among themselves.

The learned trial judge has dealt with the topic of illness very exhaustively, tracing its course from day to day, and giving due weight to all the relevant facts and materials before him. It is not necessary for me to recapitulate at length his analysis of the evidence, but it will be enough to notice only some of the salient points in the light of the arguments which were advanced before us.

The main question is to find out, first, what were the actual symptoms exhibited by the second Kumar in his illness, and then, whether they were symptoms of biliary colic or of arsenical poisoning. As it is the plaintiff's case that the Kumar developed symptoms of such poisoning in the evening on the 7th May which continued throughout that night, and on the following

day, this would be the really crucial period to be considered, and in this connection the defendants urge that the condition of the patient on the morning of the 8th May should be a point of decisive importance. The plaintiff says that on this morning the Kumar was in a condition which unmistakably pointed to arsenic poisoning, whereas the defendants maintain that he kept very much better until about mid-day when he suddenly took a turn for the worse, necessitating an emergent summons to Col Calvert.

SYMPTOMS OF BILIARY COLIC

It is perhaps important at the outset to get an idea of the nature and symptoms of biliary colic. Colic is a general term applied to spasmodic paroxysmal pain situated in the abdomen, and according to the medical authorities, there are three kinds—intestinal colic, hepatic or biliary colic, and renal colic—and they have certain features in common—(1) the pain is extremely severe, and sudden in its onset, (2) not infrequently there is vomiting from the severity of the pain, (3) the face is pale and "anxious", and in severe cases the pulse is rapid and feeble, though it practically never exceeds 100, (4) the temperature is neither above nor below normal, (5) the physical signs in the abdomen are negative, and the pain may even be relieved by pressure, (6) the patient is "doubled up" with pain, restless, trying to find a position of comfort.

In this case we are concerned only with *biliary colic*, which is due to the passage of a gall-stone into the bile duct. Gall-stones are accretions which form in some part of the biliary passages, most commonly in the gall bladder, and when they move along any of the ducts, they give rise to biliary colic. Gall-stones may be completely latent. More frequently the development is preceded and accompanied by continuous or intermittent dyspepsia. These "mangural symptoms" are sometimes referred to as gall-stone dyspepsia; they are really due to cholecystitis, and not to the presence of stones. Typical attacks of severe colic are less frequent and are uncommon in the absence of previous symptoms. Symptoms may be absent when the stone is at rest, but when it begins to move—(i) the pain is agonising, it starts in the epigastrium and shoots into the right hypochondriac region towards the spine and up to the right shoulder, but never passes downwards. The paroxysm is usually so severe that the patient is in a state of partial collapse, with vomiting, hiccough, subnormal temperature and a quick, weak pulse. Sometimes there is a rigor and the temperature rises a few degrees. Between the paroxysms of acute pain there is a constant dull aching and tenderness over the hepatic region. The attack lasts from a few hours to a few days. (ii) The liver may be enlarged, and if a stone becomes impacted in the hepatic duct, the enlargement may be considerable. (iii) Jaundice usually appears 12 to 24 hours after the paroxysm, and lasts from a few days to a few weeks. It is most intense when the stone is impacted in the common duct.

The symptoms which arise vary somewhat with the position of the gall-stone, according as (i) it is impacted in the common duct, (ii) it is impacted in the neck of the gall bladder, i.e., in the cystic duct, or (iii) it is impacted in the hepatic duct. The second kind of cases being the most frequent and the last very rare.

When a stone is impacted in the cystic duct, the attack begins with extremely sudden acute pain, high in the epigastrium or in the region of the

gall bladder or both, it may pass through to the angle of the right scapula. The violent pain is accompanied by great restlessness, in marked contrast with the motionless state of a patient with a perforated ulcer, acute appendicitis or coronary thrombosis. Some relief may be obtained by pressing upon the abdomen. The patient feels cold, he sweats profusely. Nausea almost always occurs, the presence of vomiting generally indicates that the stone has passed from the gall bladder into the cystic or common bile duct. The pain commonly disappears with absolute suddenness. The sudden onset and sudden cessation are specially characteristic of gall-stone obstruction in the cystic duct. Constipation is complete. Jaundice is absent. It occurs only when a stone reaches the common bile duct. *The important point to observe is that in this type of biliary colic none of the medical authorities indicate diarrhoea or blood in stools or any burning sensation in the stomach or cramps as a symptom.*

It is in cases of impaction of a stone in the common duct, either in the supra-duodenal or retro-duodenal portion, that death may follow in one of three ways (a) when the liver ceases to function, (b) where there is stagnation of bile and infection occurs (*suppurative cholangitis*), and (c) when the gall-stone ulcerates through the wall of the common duct, and general peritonitis supervenes. There is no question in this case of any ulceration or perforation of the gall bladder or of the bile ducts.

The above account has been collected from standard medical text-books, such as Price's "A Text-Book of the Practice of Medicine", Bailey and Love's "A Short Practice of Surgery", Savill's "A System of Clinical Medicine", Taylor's "Practice of Medicine" and Osler's "Principles and Practice of Medicine", and is also supported by the evidence of the medical witnesses.

I may call attention to the important points in this evidence without attempting to set it out in detail. To begin with Calvert, what is important in his evidence is not the symptoms he mentions, but the symptoms he cannot help mentioning. Having stated that the second Kumar died of biliary colic, it is not at all surprising that even after the lapse of 21 years he should be able to say that to the best of his recollection the Kumar had pain on the right side of the abdomen, nausea and flatulence and occasional feelings of sickness (*Vol 2, p 209, ll 27-30*), or that he should agree that pain in biliary colic is spasmodic (*ibid, p 211, l 25*), or that the pain is on the right side of the epigastric region and that the liver is the tender part (*ibid, p 215, ll 6-10*), or that attacks of biliary colic may last a few moments, half an hour, a few hours, a day or longer (*ibid, ll 22-23*), or that the prominent symptom is pain (*ibid, p 218, l 12*). Nobody has accused Calvert of being a "quack". The astonishing part of his evidence is where he admits that he was prescribing not only for pain in the stomach and vomiting, but also for *diarrhoea and tenesmus* in biliary colic (*ibid, p 212, l 32*), or where he asserts that *blood-stained mucus in stools, with a little free blood, fresh and red in colour*, was caused by "great straining and spasm due to an impacted stone" (*ibid, p 213, ll 6-17*), or puts it as no more than "quite probable" that in biliary colic there is usually marked constipation (*ibid, p 214, ll 1-5*), or where he states that although he observed haemorrhage, he did not feel concerned in prescribing for it (*ibid, p 214, ll 34-37*), or that the promotion of bile secretion to alleviate the pain was "a matter of indifference" (*ibid, p 212, ll 13-23 and p 218, ll 24-29*).

Major Thomas was not so bold as Calvert. He was concerned to point out that in cases of gall-stones or stones in the gall bladder, there is what is known as flatulent dyspepsia or dyspepsia with flatulence (*Vol 12, p 337*,

11 8-10 and p 356, 11 26-36) As regards the "mucus with a little free blood" in the stools, the utmost Mr. Chaudhuri could get him to state was —

"The blood-stained mucus might be due to dysentery and the little free blood might be direct bleeding from an ulcer" (*ibid*, p 340, 11. 22-23)

Pointedly asked if, apart from dysenteric condition, there could be any other cause in a case of gall-stone, all that he could bring himself to say was —

"A — Yes I would say that pus might come down through the ducts and enter the intestines and in passing down the large intestines set up an inflammatory condition there, or re-awaken or re-exacerbate an old dysentery, a latent dysentery I should prefer to say" (*ibid*, 11 24-30)

After this fantastic explanation he had to admit in answer to a question from the court —

"I should prefer dysentery as explanation to any other" (*ibid*, 1 31)

By the way, would it be wrong to apply to this expert by Mr Chaudhuri's own token the remark which he chose to make (on the 2nd December, 1938) regarding this class of witnesses on the other side—"experts who, we know, can come and support a case provided the remuneration is sufficiently large"?

The witness had to agree that "*you must suspect arsenical poisoning, if there is blood in the stools*" (*ibid*, p 353, 11 11-13) As regards biliary colic, he said that if a gall-stone is impacted in one of the ducts, the pain is not necessarily continuous as long as the gall-stone remains *in situ*. During the intervals the stone in the duct is generally loosened, and when the loosening takes place, the pain disappears or is alleviated. If the stone is continuing inside the duct, that does affect the stomach, but this would not be easy to explain (*ibid*, p 356, 1 37—p 357, 1 12)

Col Denham White is much shorter and more restrained. He has known cases of death from gall bladder, and knows that there is no case of biliary colic in which there is no dyspeptic pain in the stomach (Vol 17, p 156, 11 33-36), but as for the little free blood with mucus in stools, he opines it was a case of "bacillary dysentery", though it was no indication of arsenic poisoning (*ibid*, p 158, 11 4-11). Cramps, he adds, may occur in biliary colic. From the prescriptions and Col Calvert's evidence, he formed the opinion that the illness was dysentery, not that the treatment was for it (*ibid*, p 165, 11 17-19), and reading his evidence, without the prescriptions, he thought it was a case of enteritis,—the symptoms of arsenical poisoning being the symptoms of acute enteritis (*ibid*, 166, 11 13-14 and p 165, 11 25-26)

Coming next to the plaintiff's medical witnesses Col MacGilchrist and Dr Bradley, it is enough to state that their evidence is in entire consonance with the authorities. They are definite that in biliary colic you get neither diarrhoea, tenesmus, spasm in the intestines, nor blood-stained mucus in stools with a little free blood (Vol 9, p 344, 11 30-36 and Vol 11, p 350, 11 1-6 and p 362, 1 35—p 363, 1 20). Both the doctors also agree that if a gall-stone got impacted in the cystic duct and the duct was ruptured in consequence, the stone and the blood due to rupture would travel to the peritoneal cavity and could never get out of the rectum. On the other hand, if the stone did not cause a complete rupture of the walls of the cystic duct, but ulcerated through it into the duodenum, the blood that would pass out of the rectum would be tarry black (Vol 9, p 345, 11 1-15, and Vol 11, p 350, 11 8-22 and p 363, 11 2-13). They are again at one with each other in saying

that there is no loss of fluid in gall-stone to cause cramps (*Vol 9, p 346, ll 13-15 and Vol 11, p 352, ll 12-13*) In biliary colic, Col MacGilchrist explains, the pain is in the right hypochondriac region, which means under the ribs, and is also felt at the back and right shoulder, and not over the region of the stomach when the stone gets impacted in the duct, the duct contracts excessively to expel it, and it is this excessive contraction which causes the pain There are three ducts—the hepatic duct, the cystic duct and the common bile duct, and he explains their action (*Vol 9, p 346, l 37—p 347, l 5*) To similar effect is the evidence of Dr Bradley (*Vol 11, p 352, ll 20-26 and p 362, ll 3-13*)

Calvert's positive evidence, which Mr Chaudhuri adopted as the defendants' case both in this court and in the court below, is that the second Kumar's biliary colic was caused by the impaction of a stone in the cystic duct His first statement in examination-in-chief was in general terms.—

"His illness was gall-stone He died of biliary colic due to a stone getting impacted" (*Vol 2, p 203, ll 3-4*)

Again—

"The illness was gall-stones The cause of death was collapse due to colic and pain and the stone impacted in the duct" (*ibid, ll 19-20*)

In his "affidavit of death" of the 7th July, 1909, also he merely stated that the cause of the Kumar's death was "collapse following upon an acute attack of biliary colic (gall-stone)" (*Ex Z(111), Vol I, p 178, ll 21-28*) In cross-examination, when confronted with an opinion of Burney Yeo that during paroxysms of pain in biliary colic the patient should be given sodi bicarb with sodi salicylas mixed in a pint of hot water to drink repeatedly in mouthfuls till the pain ceases, because this drink serves the purpose of diluting and promoting the flow of bile, Calvert said that he agreed with reservations, and added —

"If the common duct is completely blocked, it is not to be expected that this medicine will increase the flow of bile or relieve the obstruction"

He was then asked if he thought on the first day that the common duct was completely blocked, and he admitted "To the best of my recollection the common duct was not concerned at all in this case It was the cystic duct" (*Vol 2, p 212, ll 8-23*) Later on, he was more definite—"The cause, I say, was stone in the cystic duct" (*ibid, p 215, l 1*)

On the defendants' evidence and according to their case, we are not concerned, therefore, in this case with anything more than one particular form of biliary colic—a stone being impacted in the cystic duct,—not even with the cystic duct being traversed and the stone entering the common duct, much less with the stone ulcerating through the wall of the gall bladder either into the duodenum or into the transverse colon, or becoming impacted, in one case, in the lower part of the ileum, or in the other, being passed *per anum* after more or less pain and difficulty from obstruction at the sigmoid or near the anus

One or two other facts about biliary colic may be added Gall-stones are commoner in advanced life, and occur in women more often than in men Price says They are very rare before the age of 15, 75 per cent of clinical cases occur between 30 and 60, 40 to 45 being the most common age The incidence is greatest *post mortem* about 20 years later Gall-stones occur in

about 25 per cent of all women and 7 per cent of all men dying after the age of 25 Osler also states that the great majority of cases occur between 30 and 60, 40 to 50 being the most common decade They are rare under 25, but cases have occurred in the new-born and in infants Three-fourths of the cases occur in women Savill says that the prognosis as to recovery from an attack of biliary colic is excellent, but recurrence may be expected

SYMPTOMS OF ARSENICAL POISONING

It is necessary now to turn to the symptoms of arsenical poisoning Arsenic, as is well-known, is an irritant poison, and owing to the almost tasteless property of many of its compounds and preparations, it is perhaps the commonest poison used for homicidal purposes There are different varieties of arsenical poisoning it may be acute, sub-acute, or chronic But it will be enough for our purposes to consider the first type only I take the following from Price's "A Text Book of the Practice of Medicine", 5th Edition, p 381 —

Pathology The stomach contents usually contain much mucus which may be blood-stained The signs of gastro-intestinal inflammation will be present

Symptoms The symptoms commence within an hour if the stomach is empty, but may be delayed if the stomach is full, and if the poison is in the solid state there will be further delay A burning pain occurs in the epigastrium region, and nausea and vomiting usually follow The vomit will contain any food present in the stomach, and there is often much mucus Bile is usually present, and sometimes streaks of blood As the poison is passed on to the intestine, abdominal pain, of a gripping or colicky type, and usually diarrhoea occur The stools are watery, and may contain flakes of mucus The continual vomiting and diarrhoea cause exhaustion, faintness and collapse Cramps in the legs may occur, but are not a constant symptom In a severe case restlessness, stupor and coma develop, and death follows shortly Death in an acute case may occur within 24 hours, or may be delayed for three days or more

The account given in Lyon's Medical Jurisprudence for India, which Mr Chaudhuri would himself rely on, is not at all different (9th Edition, pp 489-490) According to Lyon, the earliest effects following on the taking of the poison are a feeling of faintness, accompanied by nausea and heart-burn Shortly after this the individual begins to vomit The heart-burn rapidly develops into a burning pain in the stomach, which extends upwards to the throat A patient in describing the pain said that he felt as if he had a chula (oven) in his stomach The pain increases in intensity, and spreads over the abdomen and thorax the slightest pressure on the abdomen is resented The patient tosses about on his bed, vainly trying to find some position which will bring him relief from the agonising pain, while at increasingly frequent intervals he vomits quantities of slimy fluid which may show streaks of blood The throat feels raw and parched, the thirst is unquenchable, the abdomen is distended, and the torment is increased by the super addition of colic Purging soon follows, at first of the ordinary bowel contents, later of foetid, faeculent and perhaps blood-stained matters An ominous sign is the appearance of thin, watery, turbid motions, resembling the well-known "rice-water" stools of cholera Tenesmus and anal pain of a burning character are constantly present Soon after the onset of purging

the nervous symptoms become manifest. *Cramps occur*, particularly of the muscles of the calves. *Exhaustion from pain and the rapid draining away of the body fluids brings with it the usual signs of collapse*,—a feeble pulse, embarrassed respiration and a sub-normal temperature, accompanied by cold, clammy sweat. The mind, at first unaffected, shares in the general exhaustion, a low delirium may supervene. Respiratory and cardiac weakness become progressively more marked, twitching of the muscles or even general convulsions may ensue in the end, which, however, in most cases takes place quickly from respiratory and cardiac failure, in from 24 to 36 hours. No single symptom can be considered as characteristic of arsenical poisoning any one of them may be late in appearing, slight, or altogether absent.

The evidence of the plaintiff's medical witnesses Col MacGilchrist and Dr Bradley tallies with the account given in these standard authorities. I do not propose to quote their evidence, but merely give the references—

Col MacGilchrist—Vol 9, p 343, ll 20-37, p 345, ll 18-30, p 346, ll 13-11 and ll 18-25

Dr Bradley—Vol 11, p 350, l 37,—p 351, l 2, p 352, l 3 and ll 13-14, p 358, ll 9-13 and p 361, ll 12-13

It is no use trying to belittle the last-mentioned witness, as Mr Chaudhuri attempted to do, merely because he was not familiar with Taylor's Jurisprudence or had not heard of Lyon's Jurisprudence (*ibid*, p 358, ll 6-8). Mr Chaudhuri was not able to show that his evidence, though given without reference to these authorities, was contradicted, by anything to be found therein. I do not see how it is a disparagement to any expert not to know any particular text-book or text-books on his subject merely because they happen to be known to cross-examining counsel.

Turning to the defendants' medical experts, Calvert has never seen a case of acute arsenical poisoning, but agrees that the description given to him by the plaintiff's counsel tallies more or less with that of the text-books, except that he qualifies his statement by saying that the stools may "rarely" contain a little blood, and the character of the stools more resembles the rice-water stools of cholera, and the vomiting is of a similar appearance or consistency (Vol 2, p 221, ll 27-39). He is prepared to accept Lyon as an authority, but only "generally with reservations" (*ibid*, p 222, ll 1-2).

As regards Major Thomas, he admits that symptoms of arsenical poisoning are apparently the same as those of cholera (Vol 12, p 339, ll 30-32), and that in arsenical poisoning there is extreme tenderness of the abdomen (*ibid*, p 340, ll 1-5). He, of course, says that blood-stained mucus with a little free blood would not only not indicate arsenical poisoning, but the reverse, the explanation he would give, as pointed out before, being dysentery rather than anything else (*ibid*, p 340, ll 10-31). He concedes that vomiting and purging may be expected in arsenical poisoning among other symptoms, but only "of a particular kind" (*ibid*, p 348, l 37—p 349, l 2). "The authorities on arsenical poisoning", he says, "are all agreed that the stools are large watery stools resembling the stools of cholera", and although he can see no reason why there may not be blood and mucus in the stools in the case of arsenical poisoning, he would still maintain that the mucus "would not be visible in the stools" (*ibid*, p 350, ll 30-33). A passage was put to him from Herbert French's book on "Index on Differential Diagnosis", 4th Edition, p 103 (*ibid*, p 350, ll 13-24), but he was not prepared to accept Herbert French as an authority on poisoning, though his book has run into several editions, and even the witness "would not exactly except him from the first rank", only that he "would not put him among the highest" (*ibid*,

p. 351, ll 1-13). The way in which Major Thomas tries to fence on the question of the presence of mucus and blood in the stools of arsenical poisoning is indeed a study (*ibid*, pp 352-355)

Col Denham White knows the symptoms of arsenical poisoning, but if he saw the symptoms in a given case, he would not suspect arsenic poisoning unless circumstances raised a suspicion, because the symptoms of arsenical poisoning were the symptoms of acute enteritis (*Vol 17, p 165, ll 19-26*). He admits, however, that symptoms of arsenical poisoning generally resemble those of cholera to a large extent, and the burning sensation in the stomach is very great in arsenical poisoning and that would arouse his suspicion (*ibid*, ll 27-29). In arsenical poisoning, he says, you get watery stools with mucus, but not invariably with blood (*ibid*, ll 30-33), and cites in re-examination as authority Cushny's Pharmacology, 1928 Edition, p 682, paragraph 3 (*ibid*, p. 166, l 34—p. 167, l 2).

SECOND KUMAR'S SYMPTOMS

Now, as to the symptoms of the second Kumar, particularly from after the evening of the 7th May. As to this, as already indicated, the evidence comes from the defendants' side, and much as Mr Chaudhuri may be anxious to run away from such parts of it as apparently do not suit his clients, I do not think the court is bound to permit him such latitude. It is the testimony of Dr Ashutosh Das Gupta that he would particularly avoid, but even if this is put aside, it is difficult to see how the rest of the defendants' evidence, consisting of undisputed documents and of statements of witnesses which they themselves accept, helps to make a consistent case for them.

ORAL EVIDENCE

Take, first, the symptoms which Mr Chaudhuri himself admits, but no doubt seeks to explain away, namely, those which Calvert could not deny or as to which Calvert did not say his recollection was not to be depended upon. Among other symptoms, these were—pain in the stomach, vomiting, diarrhoea and tenesmus, as indicated by his Mag Carb prescription of the 8th May, *Ex 51(e)*, and motions consisting of blood-stained mucus with a little free blood, fresh and red in colour, besides the further fact of collapse, which Calvert admits in so many words when asked about the condition of the Kumar at the time he is supposed to have given the morphia injection on the 8th May (*Vol 2, p 218, ll 1-3*).

Satyendranath Banerjee also admitted severe pain in the stomach and blood stools, only that he would not place the blood stools earlier than about half past 11 in the morning on the 8th May (*Vol 16, p 427, ll 14-17, p 472, ll 6-7 and p 483, l 28—p 484, l 10*), though, as regards collapse, he struggled hard against an unqualified admission of it (*ibid*, p 472, l 19—p 473, l 3 and p 501, ll 16-19 and ll 27-35). All the symptoms were finally put to the witness by the plaintiff's counsel, and there was no denial.

"Q—You don't suggest that the symptoms I give you—watery stools with blood, vomiting, pain in the stomach and collapse—occurred without a cause?"

A—"No" (*ibid*, p 437, ll 4-7)

Bibhabati Devi in her evidence also speaks to vomiting tendency, vomiting, and stools with blood and mucus (*Vol 12, p 202, ll 27-40*) She first denied that the Kumar had pain in the stomach, but without knowing anything of anatomy, or physiology, was able to say that the pain "would arise in the region of the liver", and then said, "from the liver it went to chest, back and stomach", correcting herself at once after this statement and admitting

"Yes, he did get pain in the 'stomach also" (*ibid, p 224, ll 7-15*) She conceded "collapse", but could not say whether it was "profound collapse" (*ibid, p 226, ll 1-2*) She would go as far as to say that the Kumar's body was "cold", but not "ice-cold" (*ibid, p 260, ll 34-38*)

DOCUMENTS CALVERT'S LETTER TO LINDSAY

Apart from this oral evidence which, as it appears to me, is more consistent with the plaintiff's case than with that of the defendants, significant corroboration comes from a document of the defendants which they would rather wish the Court to ignore—the letter which Calvert wrote to Lindsay on the 3rd August, 1921 reporting the facts connected with the illness and death of the Kumar, *Ex Z (127)*, (*Vol II, p 350*) How the defendants resisted the production of this letter, though they had shown it to Calvert before his examination, and Satyendranath Banerjee had also seen it before a copy was sent to London, and how they were ultimately forced to disclose it at the instance of the plaintiff—as a story I have already related, which is typical of the way in which the defendants have attempted to suppress material documents in the case. The existence of the original letter, now that it has been produced in court, can no longer be in doubt, but still learned counsel for the defendants stated during Lindsay's cross-examination that he had no instructions as to whether the original was in existence (*Vol 2, p 168, ll 8-9*), the cross-examination taking place after Calvert had practically admitted the document. It is difficult not to agree with Mr Chatterjee that no comment against Calvert could be strong enough for his having agreed to give evidence in suppression of the facts he himself had related in this letter, and then given his evidence contrary to its tenor.

The letter is undoubtedly an "important communication", as Satyendranath Banerjee himself admits (*Vol 16, p 493, ll 6-7*), and as further reference to it will be necessary, it is just as well to set it out here in full —

Ex Z (127)

"Confidential

Templecombe,
Willingdon Road,
Eastbourne,
3 August, '21

"Dear Sir,

"I remember the second Kumar of Bhowal who came on a visit to Darjeeling in May, 1909. He was suffering from "Gallstone". His death made a considerable impression upon me at the time, as I thought that had he only listened to our advice, he need not have died. On the day of his death he was seized with a severe attack of biliary colic. An injection of morphia would have relieved him

almost immediately of his pain. He refused to have any subcutaneous injections, because his mother when *in extremis* had died after receiving a hypodermic injection, and he attributed her death to the injection, instead of to the illness which necessitated the treatment. Owing to vomiting and purging, opium by mouth and rectum was not retained. The severe pain being unrelieved, brought on collapse from which he died. I cannot now be certain whether I was present at the moment of his death, but I saw him shortly before it in a state of profound collapse. On my last visit his Bengalee medical practitioner was present and arrangements made for the late Colonel Macrae, I.M.S., then I.G., C.H., Bengal, to see him in consultation, in the morning. Col. Macrae had been Civil Surgeon at Dacca and knew the Kumar's family. The Kumar, however, did not recover from the collapse and died the same night.

"Yours sincerely,

J. T. Calvert

"J. H. Landsay, Esq., I.C.S."

Calvert is definitely stating here that the Kumar had "vomiting" and "purging" for which he administered opium by mouth and rectum, but this was not retained, which to my mind gives a completely different picture from what Calvert now suggests in his evidence. It will not do for Mr. Chaudhuri to explain this away by saying as he did that Calvert, writing in 1921, 12 years after the event, must have been hazy in his recollection as to details. Calvert expressly writes that the Kumar's death made a considerable impression upon him at the time, as he thought that had the Kumar only listened to his advice, he need not have died, and it is significant that in his present evidence he mentions this very circumstance almost in identical terms as the reason for having a "very good recollection" of the facts regarding the Kumar's illness and death.

"Q—Have you any independent recollection of the facts mentioned in J.T.C. 1, apart from the certificate itself (*certificate of death*, Ex. 2 (III), Vol. I, p. 178)?"

A—I have a very good recollection because the death of the Kumar made a great impression upon me at the time in that I thought it was an unnecessary death, and that had he agreed to the treatment, his death need not have occurred at that time, he being a young man" (Vol. 2, p. 205, ll. 25-30).

If this was good enough to keep his recollection alive in 1931, one does not see why it should have failed him ten years earlier.

MUKUNDA'S TELEGRAM TO BARA KUMAR

There is yet another document of the defendants which, if I may so put it, helps to fix them completely, and destroys the whole of the present case of bilary colic: it is the telegram which Mukunda Guin sent to Bara Kumar from Darjeeling on the 8th May at 3-10 P.M. (Ex. 222, Vol. I, p. 300).

"Kumar is seriously ill. Frequent watery motions with blood. Come sharp."

The "frequent watery motions with blood" seems to me to carry the plaintiff almost the whole way' it not only rules out biliary colic, but suggests arsenic poisoning. All the medical authorities are agreed that thin, watery motions resembling the rice-water stools of cholera are a characteristic symptom of this kind of poisoning, and not even Calvert, who would expect fresh, red blood with mucus in biliary colic, could deny this. One of Mr Chaudhuri's complaints was that Calvert was not asked a single question as to whether the Kumar's motions were of a rice-water character, but learned counsel conveniently forgot the answer which the witness had given.

"The late Kumar never passed watery stools with blood, and had he done so, the treatment would have been adapted, if possible, to the cause of that condition" (Vol 2, p 213, ll 4-6)

It is indeed the plaintiff's case that the watery motions with blood were concealed from Calvert, which is no doubt denied in a manner by Bibhabati Devi, and expressly by Satyendranath Banerjee (Vol 16, p 473, ll 10-15, and p 483, ll 1-9 and ll 23-35). Mr Chaudhuri tried his best to make out that "watery motions" in the telegram did not mean what it said. I can well understand this coming from learned counsel who doubtless realises the implications of it, but what is significant is that his client Bibhabati Devi, though she has never heard of the symptoms of arsenic poisoning and never "applied her mind" to the subject, is still very particular in insisting that the stools referred to in the telegram were only "liquid", but "not like water" (Vol 12, p 222, ll 6-10 and p 223, ll 13-34). As is to be expected, Satyendra follows suit in typical fashion.

"Q—Does that (that is, the telegram) remind you that the Kumar had stools as there described?"

A—All that I can say is that the stools were not water but patla bajhye—very liquid stools

Q—Very liquid stools—would you call them, in Bengali, "watery motions"?

A.—We do

"Jaler matan patla bajhye kacche" I would translate "motions like water" I may also translate it as "watery" (Vol 16, p 471, l 40—p 472, l 5)

Agam

"Q—May I take it you can't explain how the Kumar came to pass frequent watery motions with blood if he was suffering from biliary colic?"

A—I can. I have heard these are the symptoms of biliary colic (To Court. I heard it at Darjeeling from Col Calvert)."

If I might pause here for a moment, this must either make Calvert a liar or brand the witness as such. He goes on

"I have heard that Col Calvert has said he was never shown watery stools with blood. I know that Col Calvert resorted (to) (sic, resented?) Mr Mukherjee's suggestion that the Kumar passed watery stools

(Adds) Experts would not call that watery stools

Q—Do you know that the only stools shown to Col Calvert consisted of blood-stained mucus with a little fresh blood?

A—Such stools as the Kumar passed were shown to him, but he had his own description " (*ibid*, p 482, l 35—p 483, l 9)

This witness makes a slight concession that he may have heard, probably for the first time in connection with this case, that watery stools with blood is a symptom of arsenical poisoning (*ibid*, ll 16-20) I may state for myself that all this equivocation, either on the part of Bibhabati Devi or of her brother, does not impress me at all, and I have no hesitation in holding that the words in the telegram must receive their plain natural meaning, in entire consonance with the plaintiff's case

DR DAS GUPTA'S EVIDENCE

If Mr Chaudhuri did not fight shy of his own witness, Dr Ashutosh Das Gupta's evidence, if referred to, would have left the matter in very little doubt. He admitted that in Mr S P Ghose's court in the Defamation Case he had said in examination-in-chief that on the day of his death the Kumar got a severe diarrhoea in the morning and passed "terribly bloody stools", but from his later recollection which is supposed to have improved with the lapse of time, from the telegrams as well as the prescriptions, he said, this was his mistake, the statement was false (*Vol 16*, p 260, ll 33-38). Quite characteristically, elsewhere in his deposition he tried to make out that the stools were "loose", not as *patla* (liquid) as water (*ibid*, p 261, ll 15-18). Later on, however, he conceded having said that "watery motions" means liquid stools like water, and that to an English doctor he would describe the purging in a case of cholera as "watery stools" (*ibid*, p 338, ll 18-24).

It follows, then, that as regards at least one important symptom—"bloody stools"—the defendants' documents belie the case they now make in their oral evidence, but either would definitely negative the case of biliary colic. The other symptoms which are practically admitted—tenesmus and collapse—are also unerring pointers in the same direction.

Bibhabati Devi made a feeble effort to deny tenesmus, just as she also recoiled from the suggestion of a collapse (*Vol 12*, p 225, l 23—p 226, l 2), but reading this lady's description of her husband's symptoms, I cannot help feeling that she was speaking more by the book than from her recollection, with her eyes set on the track which her chief medical expert had chalked out for her as best he could in the circumstances of the case.

Satyendra, as we have seen, practically admitted collapse, though he fought to the last the suggestion that the Kumar was "in a state of profound collapse" shortly before his death, as reported by Calvert to Lindsay in his letter of the 3rd August, 1921.

"Q—Would it be correct to say that "the Kumar was in a state of profound collapse shortly before his death"?

A—I have already said he was in a state of—call it collapse, call it *himanga*" (*Vol 16*, p 487, ll 20-24).

Further on

"Q—Do you remember now that his *himanga* was at its worst shortly before his death?

A—To cut short matters, I would say 'yes'

Q—Is that your answer, not to cut short matters?

A—I have given my answer" (*ibid*, p 487, l 38—p 488, l 2)
Later he said

"I do not know what Col Calvert meant by 'profound collapse' and what he meant by 'shortly before his death.'" (*ibid*, p 501, ll 30-31)

As regards the burning sensation in the stomach, the plaintiff relies on the evidence of Dr Ashutosh Das Gupta, and I see no reason why he should not be entitled to do so. In the Sripur case, Dr Das Gupta had said

"There was a burning sensation in the abdomen of the second Kumar on the 8th May, the day on which he died" (*Ex 394 (10), Vol III, p 20, ll 11-12*)

On this being put to him in cross-examination, he did not repudiate the statement but explained that he had said it in Bengali, and then indulged in a piece of verbal quibbling which only one conversant with the Bengali language will appreciate. It is enough to state that he had to admit that the Bengali words which he had used did mean burning sensation in the stomach, though he would object to their being taken to mean, 'stomach burns' (*Vol 16, p 302, l 22—p 303, l 7*). If this evidence is accepted, here was again a characteristic symptom of arsenical poisoning, contra-indicated in biliary colic.

Mr. Chaudhuri's answer as regards the burning sensation was that it was disposed of by the belladonna liniment and the rubbing of the ginger powder over the stomach, as prescribed by *Ex 51 (d)*, the last prescription of the 8th May (*Vol I, p 283*). Bibhabati Devi had said that the nurses rubbed the white powder all over the body of the Kumar—hands, feet, chest, abdomen, back, everywhere—all over the body, and it did not appear that this rubbing over the chest and abdomen was causing him any pain or discomfort (*Vol 12, p 203, l 37—p 204, l 2*). Mr Chaudhuri also refers to the evidence of Jagat Mohini the nurse (*Vol I, p 293, ll 4-16*). Apart from the fact that this argument is based on an attempt to reconstruct the illness from prescriptions, a course which Mr Chaudhuri has so strongly deprecated, learned counsel forgets that on the plaintiff's case the Kumar was in a state of profound collapse when the liniment or the ginger powder might have been applied—in fact long past the stage when he would be complaining of a burning sensation in the stomach. The plaintiff's own evidence, it will be recalled, is that he felt this pain during the night of the 7th May, and it is now admitted by the defendants that the Kumar had some pain that night. It could not be the pain of biliary colic, for apart from anything else, one should expect in that case that Calvert would be called in, or at any rate, there would be a prescription, but the defendants' own evidence establishes neither the one nor the other.

In discussing the Kumar's symptoms so far, I have avoided any reference to the prescriptions, but as the learned trial judge has pointed out and as is also established by the medical authorities and the medical evidence in the case, the prescriptions fully support the conclusion I have already indicated. Apart from the prescriptions, some of the symptoms, as I have shown, are definitely not those of biliary colic but of arsenical poisoning, and the effect of these, in my opinion, is not at all destroyed by the other symptoms merely because they are to be inferred from prescriptions or might be consistent with biliary colic. In this view of the matter, it is perhaps

not necessary to enter into any further examination of the other symptoms or of the prescriptions. The symptoms must be taken in their totality, and so taken, I do not think it is possible to say with Mr Chaudhuri that the symptoms, whether deducible from the prescriptions or otherwise, neither point unmistakably to arsenic poisoning on the one hand, nor exclude biliary colic on the other.

One cannot overlook in this connection the case which the defendants themselves made through their medical witness Col Denham White who said this in examination-in-chief

"Reading Calvert's description, the first thing that occurred to me was that it was a case of *bacillary dysentery*. I think on the whole that is my opinion" (*Vol 17, p 158, ll 9-11*)

Nor is it possible to ignore the definite opinion which he expressed in cross-examination

"From Col Calvert's evidence, not from the prescriptions, I formed the opinion that the case was one of *enteritis*" (*ibid, p 166, ll 13-14*),

and again

"Reading the evidence of Col Calvert, I think his treatment was directed towards *acute enteritis*, not taking into account the pills in *Ex 51(a)*" (*ibid, ll 19-21*)

If this is read with Col Denham White's previous statement that "the symptoms of arsenical poisoning are the symptoms of acute enteritis" (*ibid, p 165, ll 25-26*), it is difficult to see how Mr Chaudhuri can resist a conclusion, so far as it is possible to rest a conclusion on expert medical opinion, which is wholly contradictory of his case. It will be observed that Col Denham White expresses his opinion, not from the prescriptions, but from Col Calvert's own evidence, the whole of which he had read, and it hardly lies in the mouth of Mr Chaudhuri to say that his expert was less competent to do so than any other person. Nothing is gained by pointing to the words of conventional apology which Col Denham White used before criticising the opinion of Calvert—"I should not consider myself presumptuous in giving my opinion after reading the prescriptions and Col Calvert's evidence, but I should feel I was rather unwise, not having seen the patient" (*ibid, p 166, ll 7-9*)

Major Thomas, it should be noted in this connection, said that enteritis is inflammation of the mucus membrane of the intestines, caused by a bowel irritant which may be organic or inorganic, and that arsenic is a well-known chemical irritant (*Vol 12, p 373, ll 23-25*)

I do not know if any one in the position of the plaintiff, who in the circumstances of the case has nothing but his own incomplete account to give, could derive stronger or more convincing corroboration of his story from expert witnesses on the other side.

DARJEELING TELEGRAMS

In support of his case and in refutation of that of the plaintiff, Mr Chaudhuri placed some reliance on the Darjeeling telegrams other than the one in which Mukunda reported "frequent watery motions with blood", but what are the

indications of these? All the telegrams may be placed together in the consecutive order of their despatch, day by day —

- 1 6th May—10 A.M. "Last night Kumar had fever below 99 No anxiety, no fever now Kindly wire health" (*Ex 261, Vol I, p 296*),
- 2 6th May—6-45 P.M. "Kumar attacked fever yesterday with severe stomach pain Civil Surgeon attending" (*Ex 223, Vol I, p 294*).
- 3 6th May—8-55 P.M. "Fever abdominal pain lasted two hours Now remission, no anxiety, no fear of recurring" (*Ex 224, Vol I, p 301*)
- 4 7th May—7-10 A.M. "Kumar had good sleep last night No fever, no pain" (*Ex 282, Vol I, p 297*)
- 5 8th May—7-20 A.M. "Had fever Slight pain yesterday Now normal, no anxiety" (*Ex 225, Vol I, p 302*)
- 6 8th May—11-15 A.M. "No fever, slight pain Vomiting tendency Civil Surgeon attending No anxiety Coming giving rice Wire 1000 passage" (*Ex 221, Vol I, p 298*)
- 7 8th May—3-10 P.M. "Kumar is seriously ill Frequent watery motions with blood, come sharp" (*Ex 222, Vol I, p 300*)

SYMPTOMS

So far as can be gathered from these telegrams, the symptoms were as follows —

- (1) Fever below 99 on 5th May night, no fever on 6th May (10 A.M.).
- (2) Fever "yesterday" (5th May) with severe stomach pain
- (3) Fever and abdominal pain for two hours on 6th May Remission "now" (8-55 P.M.)
- (4) Good sleep on 6th May night no fever no pain (on 6th night)
- (5) Fever and slight pain on 7th May Normal "now" (8th May, 7-20 A.M.)
- (6) No fever, but slight pain and vomiting tendency on 8th May, (11-15 A.M.)
- (7) Seriously ill, frequent watery motions with blood (8th May, 3-10 P.M.)

The condition disclosed in the telegrams excepting the last is not at all serious, and one wonders really why so many messages, some of them urgent, should have been sent—three on the 6th, one on the 7th and two on the 8th. It is significant, when presumably on receipt of the last alarming telegram of the 8th May (3-10 P.M.), Bara Kumar wired back the same afternoon at 4-45 P.M.—

"Very anxious, wire condition very often, wire immediately present condition",

that not one further telegram was sent to him, though on the defendants' case, the second Kumar remained alive up to midnight! Admittedly, a telegram announcing death was sent, but as already seen, this has not been produced and there is a serious controversy as to which party was keeping

back the document Mr. Chandhuri very often asked us to consider probabilities but what is the probability suggested by this total blank as regards communication between 3-10 P.M. and midnight of the 8th May—according to the defendants, the most critical period in the history of the second Kumar's illness, and this in spite of Bara Kumar's express and anxious request—"wire condition very often", "wire immediately present condition"? Leaving aside the telegram of death, the defendants do not suggest that any other messages were sent from Darjeeling to Jaidebpur besides those which have been produced

NO MENTION OF BILIARY COLIC

It will be seen that there is no mention of biliary colic in any of the telegrams, though biliary colic is supposed to have been talked of at Darjeeling right from the beginning, according to Satyendra's own evidence (*Vol 16, p 471, ll 19-20*) His explanation of this, however, is illuminating he had "no idea about the technical name" (*ibid, p 482, l 11*) Calvert, he says, had been using this expression before, but he does not remember whether Calvert did so at the time he proposed an injection to the Kumar on the morning of the 8th May He was calling this "pain in the stomach" instead of using the right expression, because later on he came to know the word "frequently", but *at that time* he had no idea (*ibid, p 481, ll 36-39*) All that I need say is that comment on this kind of evidence is waste of words

NECESSITY FOR HYPODERMIC INJECTION

Another thing seems also to be clear from the telegrams If these reports which were being sent to Bara Kumar about his brother's condition were at all correct, there could have been nothing serious, and no occasion, therefore, for Calvert pressing for a hypodermic injection at any time before mid-day of the 8th May at the earliest,—which would at once falsify the case the defendants attempted to make through Calvert as well as through Bibhabati Devi and Satyendra among others, regarding the Kumar's "strenuous refusal" "*throughout his illness*" to take this the "proper treatment" "until the last moment when it was too late" (*Calvert—Vol 2, p 204, ll 22-23, p 211, l 32—p 212, l 4, p 215, ll 34-35, and p 223, ll 31-34*) Bibhabati Devi, it may be pointed out in this connection, was quite clear that Calvert wanted to give a hypodermic injection to the second Kumar, first on the morning of Friday, the 7th May, and then again the following morning (*Vol 12, p 202, ll 20-22 and ll 25-27*) Her astute brother would put it in a more guarded form

"Col Calvert had been suggesting hypodermic injection The Kumar obstinately and persistently refused to have it He had his own prejudice against that

This was proposed, so far as I remember, on the 7th and also on the morning of the 8th—about the 8th I definitely recollect" (*Vol 16, p 428, ll 16-20*)

In cross-examination, he was quite sure that Calvert suggested an injection on the 8th morning, and *the Kumar was having the pain of biliary colic at the time* He must have suddenly remembered, however, that this would not fit in with the telegrams, and pulling himself up at once, he said in the

same breath the Kumar "was *not* having pain. He had *no pain* in the morning"! He still adhered to his statement that Calvert suggested injection to alleviate pain (*ibid*, p 467, ll 1-9). Later on, Satyendra was confronted with the death certificate on the 7th July, (*Ex Z(111), Vol 1, p 178*), in which Calvert distinctly stated that "the attack became acute *on the morning of the 8th*", and thus produced a reaction in the witness which was fully worthy of him.

"Q.—Thus statement that his condition was acute in the morning accords with Ashu Doctor's statement that his condition was such that doctors had to be sent for?

A—I also say that doctors had to be sent for, but it was not early morning. It was by mid-day.

Q—Do you refer to mid-day as morning?

A—I do not, Bengalees do not.

Q—Your evidence that Dr Calvert offered to inject morphia on the 8th goes to show he had the attack on the 8th morning?

A—He had either a slight attack or it was suggested as a precautionary measure.

To Court. Against pain that might come, because the Kumar had been suffering from pain for the previous two or three days and the pain would come off and on" (*Vol 16, p 481, ll 1-14*).

As the learned judge puts it, one no more injects morphia in anticipation of biliary colic than one chloroforms a person against a possible abscess and a possible operation (*Vol 18, p 336, ll 38-40*).

DETAILED EXAMINATION OF TELEGRAMS

If the telegrams are examined a little closely, it will be seen that they either falsify, or are falsified by, the other evidence of the defendants, in whichever way they may choose to take it.

(i) Take the first telegram of the 6th May (10 A.M.), *Ex 261*, which mentions only fever below 99 "last night", but not pain. Still the defendants' present case is that the Kumar's illness began with *fever and pain* on the night of the 5th May. Thus, Bibhabati Devi says in examination-in-chief:

"His illness began on Wednesday night. He had fever and "colic pain" that night—at about midnight. The pain lasted 1½ to 2 hours" (*Vol 12, p 202, ll 11-12*).

Satyendra also says:

"At first he (Kumar) had fever and pain in the stomach" (*Vol 16, p 427, l 5*).

He was shown the telegram, and he explained that "last night" meant the night of the 5th May right up to the dawn of the 6th (*ibid*, p 496, ll 36-37), but he was unable to give any explanation as to why the pain was not mentioned in the telegram. He had admitted before that in the early hours of the 5th (i.e. between 3 and 6 A.M.), the Kumar "rolled in pain", (*ibid*, p 468, ll 4-5), though later he said, "this was an exaggeration", and explained that what he meant was "pain" and not "agony", that it was "much", not "very much" (*ibid*, p 495, ll 23-25, ll 27-29 and ll 33-34), all the same, he could

not maintain to the end that the Kumar's condition "was such that it must not be mentioned in a telegram" (*ibid*, p 496, ll 4-5)

(ii) As to the next telegram (*Ex* 223) sent at 6-45 P M on the 6th May, it mentions fever "yesterday" with *severe stomach pain*. If "yesterday" refers to the day-time of the 5th, it would be opposed to the defendants' case. If, on the other hand, as Satyendra would have it, "yesterday" means "yesterday night", the word "night" having been dropped for abbreviation (*ibid*, p 496, ll 30-33), not only would this telegram not fit in with the earlier message of that morning, but it would go against Satyendra's statement just quoted that the pain during the night of the 5th was not severe or acute. It would also leave him without any satisfactory explanation as to why no doctor was called in. If at any time, says he, the Kumar had severe pain, and the hour not "unearthly", he would get a doctor—by "unearthly hours" he means from 1 A M to 4 A M (*ibid*, p 497, ll 7-9). If a third reading of the telegram is attempted, namely, that the "fever" was on the 5th night, and the "severe stomach pain" on the 6th during the day-time, it may perhaps be possible to reconcile it with the previous message, but when the "Civil Surgeon (was) attending" on the 6th May, according to the defendants the Kumar was not very ill. Satyendra says that when Calvert came in the morning on the 6th, the Kumar had very little or no fever (*ibid*, p 466, ll 7-10), and Bibhabati Devi's evidence also is to the same effect,

"Towards dawn the fever and the pain grew less. The pain grew less towards dawn. No doctor came that night. The doctor came on Thursday morning (6th May)—Dr Calvert. Up to after mid-day the second Kumar was well, but towards afternoon colic and fever began again" (*Vol* 12, p 202, ll 15-19)

(iii) As regards the third telegram of the 6th May despatched at 8-55 P M, *Ex* 224, it mentions fever and abdominal pain which lasted two hours. This obviously could not refer to the fever and pain mentioned in the next preceding telegram, as in that case there would be no occasion for sending this further message. If, then, it refers to a fresh attack, as it must, this could only be after the despatch of the earlier telegrams, but it would be hard to reconcile it with the fact that no doctor was called in during this attack. Satyendra, who admits that the pain mentioned here was serious enough for bringing in a doctor, no doubt recollects that a doctor did come, and as admittedly Calvert came only on the 6th morning, he says that "this doctor was possibly Nibaran", but himself adds that he was "likely to make a mistake" on this point (*Vol* 16, p 497, ll 28-29). Bibhabati Devi is more candid and does not bring Dr Nibaran Chandra Sen to "Step Aside" on the 6th at all. Dr Ashutosh Das Gupta's present evidence also is that Dr Nibaran Sen did not come either on the 6th or on the 7th May (*Vol* 16, p 265, ll 38-39). In any case, the undisputed fact remains that there is only one prescription on this date—the carminative mixture and the opium liniment of Calvert, *Ex* 51 (*Vol* 1, p 273).

KUMAR'S CONDITION ON 7TH NIGHT

(iv) As for the next telegram, the only one of the 7th May, sent at 7-10 A M, *Ex* 282, it says "no fever, no pain", and also "Kumar had good sleep last night", but this last-mentioned detail is contradicted by Satyendra's own entry in his diary under date the 7th May (*Ex* 399 (1), *Vol* 1, p 306). "Ramendra's illness continues, pain in stomach with slight fever. No sleep

last night". His attempt to explain it away as referring to his having no sleep himself has only to be stated, to be rejected (*Vol 16, p 497, ll 35—p 498, l 10, see also judgment Vol 18, p 329, ll 12-21*). This telegram is also contradicted by Satyendra's evidence that the Kumar got fever and pain at night on the 6th May (*Vol 16, p 466, l 3*)

(v) The next telegram, the first to have been sent on the 8th May (7-20 A.M.), *Ex 225*, was a very re-assuring message "Had fever, slight pain yesterday (i.e., 7th May) Now normal, no anxiety", but unfortunately it is belied by Satyendra's own evidence, which had no doubt to be, wrung out of him, after a great deal of struggle

"Q—Would you now admit that the Kumar rolled about in bed after dusk on the 7th in pain?

A—I do, but by "rolling about" I mean what I already said—frequently changing of side" (*Vol 16, p 496, ll 10-13*)

Whatever "rolling about" might or might not mean, here is a clear admission that the Kumar had pain after dusk on the 7th May. Satyendra had of course begun by saying, when asked about the second Kumar's condition on the night of the 7th

"On that night he was also better" (*ibid, p 427, ll 29-30*)

"It may be", he said a little later, "that I heard that Ashu doctor has said that the pain on the 7th night continued on the 8th morning", but "I do not remember anything particular happening on the 7th night before I went to bed", which he did at the usual hour, i.e., at about 10 P.M. (*ibid, p 466, ll 30-37*) Further on, followed a half-hearted admission of pain on the 7th night

"Q—Would you agree with me that if the Kumar was suffering from pain on the 7th night, doctors should have been called to see him?

A—Yes, doctors or a doctor were called. I recollect that at least one was called, but it may be two" (*ibid, p 473, ll 24-27*)

Again

"Q—You cannot repudiate the evidence of Ashu doctor that the pain that the Kumar had at night continued to the 8th?

A—He might have had a little" (*ibid, p 474, ll 4-6*)

He again repeats that either Dr Calvert or Dr Nibaran was sent for on the evening of the 7th, and says they were called in to treat the pain, which was "some pain", but "not severe pain". As there was no prescription for pain on the 7th—the only prescription of that day being the infamous concoction of Dr Ashutosh Das Gupta, *Ex 51 (a)*—Satyendra, of course, does not remember if the doctor who came prescribed any medicine (*ibid, p 474, l 34—p 475, l 12*). Finally, this very truthful witness had to make the admission already referred to that the Kumar "rolled about in bed after dusk on the 7th in pain"

The same admission is also to be found in the evidence of Dr Ashutosh Das Gupta, which is of particular importance in this connection, seeing that he was the sender of the telegram, thus being in fact the only telegram to have been sent by him to Bara Kumar from Darjeeling about the second Kumar's illness. This is the final statement of this witness.

"The Kumar had, I said, pain on the night of the 7th. This pain had a connection with the calling of Col Calvert on the morning of the 8th. I cannot say whether the pain of the second Kumar on the night of the 7th made the second Ranu very anxious. I do not remember whether I was with the Kumar on the night of the 7th when the pain was on, but I ought to be there. The pain on the night of the 7th May was the pain of biliary colic" (*Vol 16, p 334, l 32—p 335, l 19*)

And yet this doctor was wiring the next morning at 7-20 A.M. "slight pain yesterday, now normal, no anxiety"!

"A SUGGESTION OF DESPAIR"

Mr Chaudhuri made an ingenious attempt to explain away this evidence by a suggestion which, if one may borrow an expression of Satyendra, was "a suggestion of despair" (*Vol 16, p 496, l 18*). Learned counsel actually said in his reply (on the 11th August, 1939) that "both these witnesses were led to speak of the pain of the 7th evening for the pain of the 6th, being shown a telegram sent on the 6th May, *Ex 224*", and to explain how the witnesses were misled, he drew attention to the fact that on the original document the date was put down as the 7th. This telegram reads as follows: "Fever abdominal pain lasted two hours. Now remission, no anxiety, no fear of recurring." Mr Chaudhuri was doing less than justice to his witnesses, for they were really not so simple-minded as he would have us believe. Before Satyendra made the statement in question (*Vol 16, p 496, ll 12-13*), he had not been shown this telegram, *Ex 224*, at all, but a different telegram, namely, the first one of the 6th May, *Ex 261*, which stated—"Last night Kumar had fever below 99", and the witness could not possibly be making any mistake about it, as he was being cross-examined regarding the condition of the Kumar in the early hours of the 6th. Mr Chaudhuri added that before seeing the telegram, *Ex 224*, Satyendra had spoken of pain on the 6th and no particular pain on the 7th night (*Vol 16, p 466, l 36, p 465, l 34, p 474, ll 1-9*), but all this is beside the point, as pain on the 6th need not exclude pain on the 7th, and an earlier statement of such a witness that there was little or no pain on the 7th night does not necessarily imply that he could not make a different statement afterwards. As any one reading the cross-examination will see, the whole object of it was to prove that the earlier statement was false and false to the knowledge of the witness.

As regards Dr Ashutosh Das Gupta, the suggested explanation of Mr Chaudhuri is still less probable. Apart from the fact that Dr Das Gupta's statement already quoted is quite definite and leaves no room for any possible misapprehension on his part, and apart from the further fact that *Ex 224* was not shown to him at all at or about the time he made the statement, one has only to refer to earlier parts of his evidence, where he stated that on the 7th May the Kumar had biliary colic about dusk, and that he had "such pain as was likely to need specific prescription" and that the pain was "very great pain" (*Vol 16, p 271, ll 31-37*).

(vi) Coming to the next telegram of the 8th May sent at 11-15 A M, Ex 221 (a), which read as follows "No fever, slight pains, vomiting tendency, Civil Surgeon attending, no anxiety, coming giving rice, wire 1000 passage", the object was apparently to convey to Bara Kumar quite a hopeful account of the second Kumar's condition that morning, in spite of the "slight pains" and the "vomiting tendency", because it definitely suggested that the Kumar was recovering and expecting shortly to come down to Jaidebpur, for which a telegraphic remittance of Rs 1,000 was asked for "Giving rice" is a common Bengali expression for return to normal diet, and the words "coming giving rice" apparently meant that the whole party would be coming back after the Kumar took nourishment. This telegram, however, is contradicted by the defendants' own evidence regarding the Kumar's condition on the 8th morning. Dr Ashutosh Das Gupta's evidence that the pain on the 7th night continued to the 8th morning has already been referred to. Satyendra as well as his sister would like to say that the Kumar took a sudden and serious turn for the worse only at about mid-day on the 8th, i.e., from after the hour of despatch of this telegram (Vol 16, p 427, ll 12-18), but he admitted later that when Calvert came on the 8th morning and suggested a hypodermic injection, the Kumar was having the pain of biliary colic (*ibid*, p 467, ll 4-5), though, as already pointed out, he wanted the next moment to withdraw the statement. He afterwards expressly repudiated Dr Das Gupta's evidence to the effect that the Kumar's condition was such on the 8th morning that Col Calvert had to be sent for (*ibid*, p 474, ll 7-9), and was prepared merely to agree that the pain that the Kumar had at night on the 7th continued to the 8th, "only a little" (*ibid*, ll 4-6). He was later asked, if the Kumar had no attack when Calvert proposed to inject morphia in the morning on this day, meaning thereby, as he explained, the time between 9 and 11 A M, and his answer was

"A—I say he had an attack of biliary colic then, but a slight attack
I mean the pain was slight and it had been continuing

To Court By 'slight pain' I mean—when the Kumar was asked 'Have you any pain?', he would say 'A little of it' There was no evidence of it unless he said it

Q—The attack was not on then?

A—He was not in the midst of paroxysm "

(*ibid*, p 481, ll 15-26)

Calvert's evidence is also contrary to this telegram. According to Satyendra, Calvert's first visit on the morning of the 8th May was between 9 and 11 A M (Vol 16, p 482, l 12 and p 484, l 14), and Calvert thinks it was "on the morning visit" that he saw the Kumar's blood-stained stools with mucus, about a dozen of them, which, he says, had been kept for his observation (Vol 2, p 213, ll 10-13), this shows that the stools must have commenced some considerable time earlier, seeing that Bibhabati Devi says that the Kumar was passing stools every half an hour or three-quarters of an hour (Vol 12, p 225, ll 25-26)

REFUTATION FROM CALVERT'S DEATH CERTIFICATE

The most convincing refutation of this telegram comes from a document of the defendants on which Mr Chaudhuri places very great reliance—the

certificate of death given by Calvert on the 7th July, 1909, *Ex Z(111)* (Vol I, p 178), which, as pointed out before, distinctly states that "the attack became acute on the morning of the 8th" Mr Chaudhuri's gloss that "morning" meant "the doctor's morning", that is, any time up to, say, 2 P.M. without putting a single question to Calvert about it—was, I should have supposed, worthy only of Satyendranath Banerjee and not of learned counsel Satyendra, in fact, when giving his recollection that the Kumar was "ill", but not "very ill" on the 8th morning, thought it fit to add that by "morning" he meant "up to 10 o'clock", but at once checking this unconscious betrayal of lack of circumspection, he volunteered "*By morning Europeans mean up to lunch time*" In answer to a very natural question provoked by this gratuitous impromptu, he explained to the court, "There is no particular reason for adding this" (Vol 16, 465, ll 6-9) This was an obviously false answer, for Satyendra had a very "particular reason" for adding this little bit of technical knowledge, which came out later when he was confronted with Calvert's death certificate

"Q—This statement that his condition was acute in the morning accords with Ashu doctor's statement that his condition was such that doctors had to be sent for?

A—I also say that doctors had to be sent for, but it was not early morning It was by mid-day

Q—Do you refer to mid-day as morning?

A—I do not, Bengalees do not " (Vol 16, p 481, ll 1-7)

"Bengalees do not, but Europeans do", as he had stated before—that was the obvious implication Satyendra forgot, however,—as did learned counsel as well—that Calvert had already proved himself a "Bengalee" in this respect long before Satyendra volunteered his help Calvert had said

"The Kumar passed motions consisting of blood-stained mucus with a little free blood"

"Q—When?

A—On the day he died In the morning or in the middle of the day" (Vol 2, p 213, ll 6-9), clearly distinguishing 'morning' from the 'middle of the day'

Bibhabati Devi was also faced with the death certificate—a document which she had set out in *extenso* in her own written statement—but she scuttled away

"Q—Do you know that the certificate says that the Kumar's condition was acute in the morning?

A—I do not know" (Vol 12, p 231, ll 1-3)

1. REMARKABLE DOCUMENT

The telegram itself appears to be a somewhat remarkable document According to the previous messages, there was nothing serious with the Kumar at any stage of his illness, and this telegram adds a distinct note of buoyancy by the prospect of "giving rice" which it holds out still one wonders why there should be any anxiety to rush the Kumar back to Jaidebpur instead of leaving him at Darjeeling to recuperate, or why there should be

this peremptory requisition for funds by telegraphic remittance. Perhaps one should not be justified in indulging in these speculations, seeing that Satyendra, who admits responsibility for all the telegrams (*Vol 16, p 465, li 12-21*), was not cross-examined on these points. All that need be pointed out is that the evidence shows that the Darjeeling house had been engaged for three months at a rental of Rs 400 per month, of which not even a month had expired, and the estate cash book, *Ex Z(243)*, contains the following entries regarding Darjeeling expenses

8th April, 1909 (Satyen)		Rs 400
17th April	Rs 1,456	
	Rs 1,500	
	Rs 125	
	Rs 50	
	Rs 26	
28th April		Rs 1,000
10th May, 1909—		
(T M O to Mukunda to bring Bow Ram, i.e. Bibhabati Devi)		Rs 500
10th May, 1909—		
(Advance to J N B to go to Poradah)		Rs 400

(vi) The next telegram, *Ex 222*, mentioning "frequent watery motions with blood", is one which the defendants would gladly disown, if only they could

PLAINTIFF'S POSITION IN REGARD TO TELEGRAMS

The position which the plaintiff takes up in regard to these telegrams is quite understandable, but not so that of the defendants. They are their documents, Satyendra himself vouches for their correctness, still the defendants' other evidence, oral or documentary, is not consistent with them. The telegrams are supposed to contain facts which are within the special knowledge of the defendants, and it should be for them, therefore, to give such explanation of these documents as will reconcile them with one another and with the other evidence, which, however, as I have shown, they have failed to do. So far as the plaintiff is concerned, in my opinion he is entitled to rely on any of the telegrams which fit in with his case, and those which he rejects, he rejects not merely because they are inconsistent with his case, but because they are falsified by the defendants' own evidence. One does not know why Mr Chaudhuri did not cross-examine the plaintiff in regard to these telegrams to find out if any of them had been sent with his knowledge or approval, or as to why, so long as he was well enough, he did not send a message himself to his eldest brother. Nor do I understand why learned counsel for the plaintiff did not question his client about them either, as undoubtedly he might and should have done.

DEFENDANTS' POINTS ARISING OUT OF TELEGRAMS

It is necessary now to consider the points which Mr Chaudhuri wanted to make regarding the telegrams for the purposes of his case.

If I have followed him aright, his first point was that the telegrams showed that the Kumar had fever, and if that was so, Dr Ashutosh

Das Gupta's prescription of the 7th May, *Ex 51(a)*, would be fully justified, inasmuch as the medical evidence was that such a prescription was suitable for fever. As to this, in the first place, I am not at all sure that the defendants would like to make the case that this medicine had been actually administered to the second Kumar. In any case, all that need be said is that Dr Das Gupta's own evidence would furnish a complete answer to this prescription. As I have said before, Dr Das Gupta must be held to be its author, his story that he took it down to the dictation either of Calvert or of Nibaran Sen being demonstrably false on his own showing, and he has himself admitted that this medicine cannot be given during the pain of biliary colic, he would give it "only if the patient has malaria—the fever on with constipation", he would "not give it to a chronic malaria patient who has diarrhoea and who is in the pain of biliary colic" (*Vol 16, p 264, ll 25-36*). Mr Chaudhuri does not contend that fever—malarial or otherwise—was the principal complaint of the second Kumar. There is admittedly no other prescription for fever besides this dubious one, and Calvert was never asked if he had treated the Kumar for fever. It may be added, as the learned judge points out (*Vol 18, p 323, ll 1-4*), that in the printed form on which Calvert gave his death certificate, *Ex Z(111)*, there is a marginal direction asking the medical practitioner to state not merely what the deceased died of, but also if he had any other disease, chronic or acute. If the Kumar had fever, or Calvert had been told anything about it, he would doubtless have mentioned it in his certificate. Apart from that, the telegrams, though almost all of them mention "fever", do not on a plain reading seem to suggest fever of any marked intensity, the first telegram in fact describing it as being "below 99". Again, according to the telegrams, the Kumar is reported to have had fever only on the night of the 5th May, for two hours on the 6th, and for some time during the day on the 7th (period not specified). A lot of useless controversy was raised in the court below as to whether the second Kumar was a chronic malaria patient suffice it to state that it is not established on satisfactory evidence that he had an attack of malarial fever at Darjeeling (*see judgment, Vol 18, p 336*). Even if the telegrams are accepted as correct, I am not prepared to hold that the fever indicated therein is such as may be supposed in any way to discount the sinister significance of the "arsenic prescription".

KUMAR'S CONDITION ON 8TH MORNING

Mr Chaudhuri's next point seemed to be that the first two telegrams of the 8th May, *Exs 225 and 221(a)*, sent at 7-20 and 11-15 A.M. respectively, were valuable contemporaneous evidence to show that the Kumar was comparatively better that morning, and that this accorded fully with another contemporaneous document, Calvert's condolence letter of the 10th May, *Ex Z(205)*, (*Vol I, p 419*). I have already referred to the defendants' own evidence which goes to contradict these telegrams, but in view of the particular emphasis which Mr Chaudhuri laid on the Kumar's condition on the 8th morning, as negating the plaintiff's case of poisoning, I may perhaps add a few further observations on the point.

In the first place, it is to be observed that Calvert was not examined at all by the defendants regarding the Kumar's condition on this morning, and his description of it in his certificate or affidavit of death was left to stand as it was. It was elicited from him in cross-examination that he saw the Kumar's blood-stained stools "on the morning visit" rather than "in the

middle of the day", and this visit, according to Satyendra's evidence, was between 9 and 11 A.M. There was no re-examination of the witness on the point. Secondly, it is admitted both by Satyendra and Bibhabati Devi that Calvert proposed a hypodermic injection on the morning of the 8th, and this is also stated by Calvert in the condolence letter—"The morning I was called in he (Kumar) felt so much better that he declined the treatment I proposed" (Vol I, p 419, ll 11-12). Calvert could not possibly be speaking here of his "mid-day" visit, to which he refers in express terms in a subsequent part of his letter. On his own evidence, it is clear that there could be no question of "hypodermic medication", if the Kumar was in fact in a more or less "normal" condition or suffering only from "slight pains". Thirdly, it is not a violent assumption to make that Calvert came in the morning because he was sent for, and he would not be sent for, if the Kumar's condition did not require or justify a call. Satyendra tried no doubt to repel this suggestion (Vol 16, p 427, l 20, in examination-in-chief and p 474, ll 7-9 in cross-examination), but this was quite typical of him: he would "send for" Calvert on the 7th evening when Calvert did not come (*ibid*, p 474, l 40), but would not send for him on the 8th morning when he did come. Bibhabati Devi merely said "On Saturday in the morning, Dr Calvert came. The second Kumar was then somewhat well. Dr Calvert wanted to give an injection, but the Kumar would not agree. He left" (Vol 12, p 202, ll 25-27). On this point Dr Ashutosh Das Gupta's evidence, allowing of course for the usual exaggerations, is more in accordance with probabilities.

"Q—Would it be true 'On the day of his death Dr Calvert was called six or seven times from 7 A.M. to 8-30 P.M.'?"

A—It would be true.

Adds I said what I remembered.

(Question repeated.)

A—Yes, it would be true."

(Vol 16, p 291, ll 5-9)

Again,

"I mentioned the three visits of Col Calvert then (that is, in the Sripur case). My present recollection is that he came many times on the 8th May. He came six or seven times."

(*ibid*, p 297, ll 32-33)

It is worth while pointing out in this connection that at one stage Mr Chaudhuri himself emphasised that "the best medical aid was sent for" on the 8th morning: this was necessary for the purpose of countering any suggestion of felonious intent on the part of Satyendra and Dr Ashutosh Das Gupta, but the moment he realised that it went directly against his case that the Kumar was comparatively better that morning, he quickly retreated and said "Probably 'sent for' is not accurate" (I am quoting his very words of 11th August, 1939).

WHAT ARE THE PROBABILITIES?

Reading the evidence as a whole, it seems to me that the probabilities are that the Kumar had started passing blood-stained stools from a fairly early hour of the 8th morning, and that if Calvert came at or about 9 A.M., he must have been sent for, and if he proposed an injection at the time, it must have been because he found the condition of the patient very acute. In any

case, it is impossible to hold that the Kumar could have been in anything like the condition indicated in the telegrams of this morning. Thus conclusion is not at all repelled by the Mag. Carb. prescription of Calvert of the 8th May, *Ex 51(e)*, (*Vol I, p 285*) as to whether this prescription was brought from Calvert from his house or not, is uncertain, and as I have said before, no such suggestion was definitely put to Calvert by the plaintiff in cross-examination, but it is enough to state, as the learned judge points out, Calvert's memory does not go to this prescription as connected with an actual visit in the morning (*Vol 18, p 349, ll 10-11*)

NO INDICATION OF GOOD FAITH

The next point which Mr Chaudhuri attempted to make on the telegrams was in connection with the last one sent on the 8th May at 3-10 P.M., which, he said, was an indication of good faith on the part of the Darjeeling people: not only was there no attempt to suppress such a tell-tale symptom as "frequent watery motions with blood", but there was an express request to Bara Kumar to "come sharp" in view of the second Kumar's "serious illness." Plausible as this argument is, it cannot bear scrutiny. In the first place, on the defendants' own evidence the alarming symptoms made their appearance at 11-30 A.M. at the earliest, and though only a quarter of an hour before a message had been sent giving a very hopeful account of the second Kumar—"No anxiety, coming giving rice",—they waited nearly four hours before communicating to Bara Kumar any news about the fresh developments. If Satyendra, as he himself says, was the person responsible for sending these messages, one has only to contrast this attempt on his part to hold back the true state of things as long as possible on this fateful day with the frequency of the messages sent on the 6th May, when apparently, on his case, the Kumar's condition could have possibly given no cause for anxiety. To my mind, if any inference is to be drawn from these telegrams of the 8th May on the question of Satyendra's good faith, the fact of this long interval between the two messages cannot certainly tell in his favour. Secondly, for aught one knows, there might yet have been no occasion for suppression of "watery motions with blood." If the previous telegrams are any indication, bilious colic was still in the air—the only illness which up to now held the field was "fever" and "stomach pain." A sudden change for the worse, serious enough to lead to a fatal termination almost with certainty, had to be accounted for: a mere onset of high temperature or increased severity of stomach pain would not serve the purpose. Some approach to actual symptoms could hardly be avoided: there was certainly less risk in it than in total suppression. Again, if Satyendra is to be believed, Calvert was in the house from shortly after mid-day: the Private Secretary had with "praiseworthy zeal" got him there: none of the alarming symptoms were kept back from him. Calvert himself was strenuously, but still without success, pressing for hypodermic injection. The prognosis, on the defendants' account, was in all conscience serious. Satyendra was for the moment the master of the house who had the direction of affairs in his hands. If he was acting *bona-fide*, what would one expect him to do in such circumstances before he sent a telegram to Bara Kumar about the second Kumar's condition? He would consult the doctor, ask him what he thought about the case, and take his advice about the message to be sent. But it is not Mr Chaudhuri's case that the 3-10 P.M. message was sent to Bara Kumar with the knowledge and approval of Calvert, which undoubtedly would have established good faith. On the other hand, there is the attempt and all the attendant equivocation to make out that "watery motions" in the telegram

meant no more than liquid stools! As regards the invitation in the telegram to "come sharp", I do not know that the defendants are entitled to claim any merit from this, seeing, in the first place, that it was out of the question for Bara Kumar to have arrived at Darjeeling before Monday afternoon at the earliest, and secondly, that on their own case they could not have paid any heed to Bara Kumar's request in his own telegrams for "immediate" information about the second Kumar's condition.

Another point which Mr Chaudhuri tried to make in connection with the telegrams was that if Satyendra was out to make a false case of biliary colic, he would have taken good care for this very reason to put "biliary colic" in the telegrams rather than avoid any reference to it. The short answer to this suggestion is that biliary colic might not have been thought of at all at this stage as a possible explanation of death.

WHAT DO THE TELEGRAMS INDICATE?

Taking the telegrams as they stand, without the aid of any commentary, all that they show, to my mind, is that the second Kumar got a slight touch of "fever" at night on Wednesday, the 5th May, if not during the day as well. It was accompanied by "severe stomach pain". On the 6th he was free from fever and pain, both in the day time and at night, except only for two hours which were probably towards the evening. On the 7th he had "fever" again and "slight pain", but on the 8th morning he was "normal" till about 11 A.M., except for "slight pains" and a "vomiting tendency". Up to now there was no cause for anxiety at any stage on any day. On the 8th morning his people there were actually hoping to "give him rice" and bring him down to Jaidebpur shortly. Somewhere between 11 and 3 during the day on the 8th, he, however, suddenly took "seriously ill" and passed "frequent watery motions with blood". The condition was alarming enough to make the inmates of the house wire the Bara Kumar to "come sharp". I believe I have given a very fair summary of the telegrams, and it passes my comprehension how any one, doctor or layman, can, possibly trace in it the remotest indications of biliary colic. On the other hand, the "frequent watery motions with blood", coupled with stomach pain, might conceivably, if not necessarily, point to arsenical poisoning, at any rate to enteritis.

WHAT DO THE PRESCRIPTIONS SHOW?

So far as the prescriptions go, for what they are worth, the indications are, I may repeat—not of arsenical poisoning, it is true, but certainly not of biliary colic either, taking them as a whole, including *Ex 51 (a)*. They are mostly sedatives for the stomach, with just a few stimulants thrown in for collapse, and an opium preparation, possibly to fight diarrhoea or dysentery, and a liniment for rubbing over the stomach. None of the prescriptions, again, is for fever, excepting probably *Ex 51 (a)* which, of doubtful efficacy as it is for this purpose, is on the other hand definitely contra-indicative of biliary colic.

In this state of the evidence furnished by the telegrams and prescriptions on the question of the second Kumar's illness, Mr Chaudhuri naturally turns away from them, and invites the court instead to fix its attention on some other contemporaneous documents which he says establish the broad fact of

iliary colic, and which, if they do not constitute the only safe basis on which to proceed, would, at any rate, be much safer evidence to act on than the doubtful evidence of symptoms at this distance of time. In view of the insistence with which Mr Chandhuri has pressed this argument it becomes necessary to examine the matter with the care and attention it deserves.

CALVERT'S CONDOLENCE LETTER AND DEATH CERTIFICATE

As already indicated, there are two documents on which Mr Chandhuri relies, not only as regards illness but as evidence of death as well—Calvert's condolence letter to Bara Kumar, *Ex Z(205)*, (*Vol I, p 419*), and his affidavit or certificate of death of the second Kumar, *Ex Z(111)*, (*Vol I, p 178*), read with his evidence in support thereof. In view of their importance, the documents may be set out in full.

(1)

CONDOLENCE LETTER

"1, Montcagle Villa,
Darjeeling
10th May, 1909,

"My dear Kumar,

"Please accept my most sincere condolence in the great loss which you have sustained through the death of your kind-hearted and amiable brother. I am afraid that his sudden death must be attributed to a little overconfidence on his part regarding the nature of his illness and its probable termination. The morning I was called in he felt so much better that he declined the treatment I proposed, even the earnest solicitation and exhortation of his Private Secretary and friends who were most solicitous concerning his condition failed to move him. Later in the day he had a relapse, the colic coming on in a most intense form. His Secretary with praiseworthy zeal himself went round the station until he had found me on my rounds and secured my early attention to the case. This time he listened to the advice of the Secretary and his friends and allowed me to adopt the right treatment. The colic quickly ceased under the hypodermic medication, but unfortunately the system had received such a shock in the interval that he sank and died from collapse in spite of all our endeavours. All that was possible was done to save your brother's life, and he received the greatest care and attention from those about him. It would have been a great boon if he could have had his friends around him, but the exacerbation of his illness came on so suddenly and terminated so quickly that it was not possible. He had had milder attacks of this nature before, and it was his recovery from these which prevented him realising the serious nature of the last one before it was too late.

"Yours sincerely,
J T Calvert"

"(Replied 20-5-09)"

This was marked as J H L 4 during the examination of Lindsay on commission.

(2)

CERTIFICATE OF DEATH

"Certificate A

"Policy No 74789

"Life—Kumar Ramendra Narayan Roy

"Claimant—Rani Bibhabati Devi

"CITY OF GLASGOW LIFE ASSURANCE COMPANY

"Certificate of Death

"To be granted by the Medical Practitioner who attended deceased in his last illness

"I, John Telfer Calvert, Lt-Col I M S, Civil Surgeon, Darjeeling, do hereby solemnly declare, that I have known Kumar Ramendra Narayan Roy for 14 days and have been his consulting Medical Attendant for 14 days, that I attended him in his last illness, that he died aged about twenty-seven years at Darjeeling at 11-45 o'clock P M on the 8th day of May, 1909 after an illness of 3 days, that the cause of his death was collapse following upon an acute attack of biliary colic (gall-stone)

"The above was inferred from symptoms and appearances during life, that the symptoms of the disease which caused death were first observed by me on May 6th, 1909, and that the attack became acute on the morning of the 8th and he died the same evening

"Signature—J T Calvert

Designation—Lt-Col I M S, Civil Surgeon

Place—Darjeeling,

Declared before me this seventh day of July, 1909

Signature—W M Crawford, Justice of the Peace and District Magistrate, Darjeeling

"N B This Certificate must be countersigned by a Justice of the Peace, Magistrate, Collector, or Judge of the place or district where the death took place, and must bear the Court's Seal when signed before any of the three last officials "

This was marked as J T C. 1 during the examination of Calvert on commission The certificate is written on a printed form of the Insurance Company, and the original should be referred to in order to see the portions in print and the portions in the handwriting of Calvert or of the attesting authority Crawford When Calvert says in cross-examination that "the whole of this" from the words "John Telfer Calvert" down to the word "Darjeeling" before the final declaration is in his handwriting (Vol 2, p 205, ll 13-15), he means by the "whole of this" the whole of the manuscript portion For easy reference, the material part of the document may be reproduced below with the manuscript portions in italics and the printed portions in capital letters

"I, John Telfer Calvert, Lt-Col, I M S, Civil Surgeon, Darjeeling, DO HEREBY SOLEMNLY DECLARE THAT I HAVE KNOWN Kumar Ramendra Narayan Roy FOR 14 days AND HAVE BEEN HIS consulting MEDICAL ATTENDANT FOR 14 days, THAT I ATTENDED HIM

IN HIS LAST ILLNESS, THAT HE DIED AGED ABOUT twenty-seven YEARS AT Darjeeling AT 11-45 O'CLOCK p.m. ON THE 8th DAY OF May 1909 AFTER AN ILLNESS OF 3 DAYS, THAT THE CAUSE OF HIS DEATH WAS collapse following upon an acute attack of biliary colic (gall-stone)

The above was inferred from symptoms and appearances during life, THAT THE SYMPTOMS OF THE DISEASE WHICH CAUSED DEATH WERE FIRST OBSERVED by me on May 6th, 1909, and the attack became acute on the morning of the 8th and he died the same evening "

It is admitted that the whole of the writing is in Calvert's hand. The document as printed in the Paper-Book leaves out the marginal directions contained in the form.

Both these documents were specifically included in the Interrogatories put by the defendants to Calvert (*Interrogatories 5-9, Vol 2, pp 201-202*), while Lindsay was asked about the condolence letter only (*Interrogatory 15, Vol 2, p 137*)

It will be remembered that Bibhabati Devi sets out both the documents *in extenso* in her written statement (*Vol 1, pp 174-175*)

DEFENDANTS' CONTENTION ON THE DOCUMENTS

Mr Chaudhuri maintains that there is nothing whatever to impugn the *bona-fides* of either of the documents which have been duly proved by Calvert, and that these cannot, therefore, but be the best evidence of the two facts mentioned therein, namely, the death of the second Kumar and the cause of his death. Death, he points out, was an accepted fact so in mentioning death Calvert could not be telling a lie. Secondly, as regards the cause of death, even supposing he had made a wrong diagnosis, he had admittedly seen the second Kumar on the 8th May, and if he had put in biliary colic in the letter, he must have done so because he believed it to be the cause of death. Mr Chaudhuri emphasises that no suggestion was put to Calvert in cross-examination that he had been "bribed" or "bought over"

UNUSUAL CHARACTER OF CONDOLENCE LETTER

As regards the condolence letter, the first thing that strikes one about it is its unusual character. It does seem to be extraordinary that a consulting physician like Calvert should go out of his way to write such a letter for no ostensible reason of his own. It is obvious that the letter must have been procured from Calvert, and that for a definite purpose. Calvert admits that he did not know Bara Kumar before the date of this letter; he had never met him. It was put to him in cross-examination that he had written it at the suggestion of the brother-in-law or the attending physician of the second Kumar. He did not remember, but added "The suggestion might have come from them" (*Vol 2, p 206, ll 11-15*). Mr Chaudhuri had to concede that it was not a spontaneous communication, but he would keep both the brother-in-law and the attending physician clear of it, and throw it on to Mukunda, the Private Secretary, long since deceased. The point he stressed

was that on the 10th May there could have been no motive to get from Calvert false evidence of death or of the nature of illness

If, as Mr Chaudhuri admits, the letter was secured from Calvert, I find it difficult to believe that neither Satyendra nor Mukunda had any knowledge of it. Whoever obtained it, he must have done so for a definite purpose, and if the letter be taken at its face value, the purpose was to get a statement from Calvert which would reassure Bara Kumar that "all that was possible had been done to save his brother's life", and that the patient had "received the greatest care and attention from those about him". In other words, the object was to get what might look like an unsolicited testimonial from Calvert, not for the Private Secretary alone, but also for the "friends" of the second Kumar "who were most solicitous concerning his condition". If Mukunda was the person to whom it occurred to get fortified with such a valuable weapon of defence, it seems to me unthinkable that he could have acted so selfishly as to have excluded either the "brother-in-law" or the "attending physician" from the benefit of it, or at any rate, kept them out of knowledge of such a signal certificate of good conduct he had secured for them.

SATYENDRA'S DENIAL OF KNOWLEDGE OF THIS LETTER

The insistence with which Satyendra disavows all knowledge of this letter is itself very significant, and is quite in keeping with the excessive anxiety he shows to disown connection with the procuring of other documents as well, such as the insurance affidavits of death and cremation, or the statements of the Darjeeling witnesses, or the statement of Haran Chandra Chakladar. Satyendra is not content with denying having procured any letter from Calvert before he came back from Darjeeling or at any time, or having had any letter of Calvert in his possession, but he says in fact that he had never seen this letter in original till it was shown to him during cross-examination (Vol 16, p 432, ll 1-3 and ll 11-13). Cross-examined about the letter, this is what he says

Q—Are you not aware of the fact that Col Calvert was not acquainted with Bara Kumar at the time?

A—I do not know, but probably he did not know him

Q—Is it your suggestion that Col Calvert wrote that condolence letter to Bara Kumar quite independently—without suggestion of any kind?

A—I have come to know of this letter only when a copy of it was sent to me as I said. Mukunda might have suggested a condolence letter from Calvert, but it is my surmise

I cannot suggest how Col Calvert came to write in such praise of these (sic) about the second Kumar during his illness. Bara Kumar did not show me the letter at Jaidebpur. I never heard about it from him or anybody. I had no talk with Bara Kumar about it regarding the correctness of the second Kumar's death" (ibid, p 535, ll 23-36)

Dr Ashutosh Das Gupta's disclaimer of this letter is equally characteristic

"(Shown letter of Col Calvert set out in the written statement of defendant No 1) — I remember the contents of the letter now

"Q—Did you know this before?

A—I heard about the letter

(Question repeated)

A—I did not know this before—that the letter said that the Kumar was well in the morning

To Court I heard about the letter and never knew its contents until now I did not know the contents of Col Calvert's "death certificate" before today " (Vol 16, p 276, ll 4-15)

BIBHABATI DEVI'S "PRETENDED IGNORANCE"

Bibhabati Devi's cross-examination regarding the condolence letter may also be referred to

"Q—Do you know that on the 10th May a testimonial was secured from Dr Calvert on Monday following the death?

A—Tell me what it was about I do not know that any letter was taken from Dr Calvert that day

Q—Have you not heard till now that on the 10th May a letter was taken from Dr Calvert?

A—By whom?

Q—By some one or other of the party at your house?

A—I do not know even now

Q—Did you send a letter of Col Calvert dated 10-5-1909, to the Secretary, Board of Revenue?

A—Let me know the subject matter of the letter

Q—Any letter of Col Calvert of that date?

A—Addressed to whom?

Q—Never mind to whom?

A—I sent a copy of the condolence letter of Dr Calvert to Bara Kumar, to the Secretary of the Board of Revenue. This copy was sent to me by Jogendra Babu, Secretary, after the arrest (sic—advent?) of the plaintiff, and I sent this copy or a copy of this copy to the Secretary to the Board of Revenue. That letter expressed sorrow at the Kumar's death. The whole of the letter was read over to me and I remember this much.

To Court My brother read it over to me. In the letter to the Secretary, Board of Revenue, I said that the letter had been suddenly found during the course of a search in Bhowal *sherista*—this is, what Jogendra Babu had written to me."

(Vol 12, p 227, ll 9-33)

Pretended ignorance could no further go. Well might one say "The lady doth protest too much, methinks!"

The defendants' story of how the condolence letter came to be discovered may be now given. According to their case, many letters of condolence came to Bara Kumar after the reported death of the second Kumar, which were all stitched up into a file with a cover marked "Condolence letters of second Kumar" and kept in the Private Secretary's office at Jaidebpur. Rai Sahib Jogendranath Banerjee, D W 310, was the Private Secretary, and his evidence is that after the plaintiff's declaration of identity he was ordered by the Manager to search for papers connected with the Kumar's illness and death, and in the course of such search his clerk Abani Mohan Banerjee discovered this file. On looking into the file the Rai Sahib came across this particular letter from Calvert which was in fact the only letter he found in it touching death and illness, the rest being all simple letters of condolence. He thereupon showed it to the Assistant Manager and the Manager, and by the direction of the Manager, sent a copy of it to the Collector and a copy to Bibhabati Devi. At the Collector's request the original was afterwards sent to him (*Vol 15, p 443, ll 12-30*). The witness adds that the condolence letters were all answered, and he would write "replied" on them to show that this had been done, and he proved a similar endorsement "Replied 20-5-09" on Calvert's letter as being in his handwriting (*ibid, ll 31-36*). The clerk Abani, D W 324, has been examined and confirms this evidence (*Vol 16, p 33, ll 13-24*). The letter by which Bibhabati forwarded a copy of this document to the Board of Revenue and the acknowledgment by the Board are both on record (*Exs Z(260) and Z(258), Vol II, pp 319 and 321 respectively*). The correspondence between the Manager and the Collector regarding this letter (certain initials and endorsements on which only were proved), will be found in the *Appendix* at pp 246-249.

Mr Chaudhuri points out that the first suggestion of the plaintiff was that this condolence letter came into existence at a much later stage than the date it bears and that the endorsement on it "Replied 20-5-09" was fabricated, but this suggestion, it is said, was afterwards given up when it was shown that these words were to be found in the photographic copy of the letter which had been kept on the record before the original was sent to England for the purposes of the examination of Calvert and Lindsay. In this connection Mr Chaudhuri calls attention to two petitions filed on behalf of the defendants in the court below on the 22nd July, 1935, putting on record the plaintiff's case as made by his learned counsel to the effect, first, that this letter might have been ante-dated and procured at any time after the arrival of the plaintiff and before the examination of Calvert (*Vol 14, p 417*), and secondly, that all correspondence addressed to the eldest Kumar including the letters of condolence had been sent to the Bara Ram long before 1921 (*ibid, p 418*). By a further petition on the following day the defendants filed a number of condolence letters purporting to come out of this file, which were in addition to condolence letters produced by them at a much earlier stage (*ibid, p 440*). Mr Chaudhuri refers to the order (*No 1116*) which the learned judge recorded on the defendants' petition on the 22nd July, and was as follows:

"As to the petition filed today touching the case as to Ex J H L 4 (i.e. the condolence letter), the learned counsel for the plaintiff says, today as to this Ex J H L 4 that the letter does not appear to have existed on the date it bears. I take his case to be exactly what he says, though on the 18th he threw out a certain suggestion as to when it might have come into existence, and did not, while making those suggestions, limit them to a point of time before Bara Kumar's

death. Learned counsel says that he does not resile from the general position taken up on that date, though he does not commit himself to a definite date." (*Vol 1, p 85, l 30—p 86, l 3*)

The plaintiff's answer was given in two petitions filed on his behalf, one on the 22nd July and the other on the 24th July, 1935 (*Vol 14, p 419 and pp 441-442*). It was pointed out that counsel for the plaintiff was not counsel for the Bara Ram, but from such information as was available, it appeared that all letters addressed to Bara Kumar including letters of condolence had been sent to the Bara Ram by the Court of Wards before 1921. Objection was also taken to the defendants filing any further condolence letters at this stage in contravention of the court's order No 734 of the 29th September, 1934 (*Vol 1, p 59 and Vol 10, pp 406-412*), particularly as the plaintiff had already closed his evidence and there was no chance of his refuting the case which the defendants were now seeking to make.

The condolence letters and telegrams produced by the defendants and admitted in evidence will be found in *Vol 1, between pp 404 and 448*.

WHEN WAS THE CONDOLENCE LETTER WRITTEN?

I do not think it has been made out that Calvert's letter was not written on the date it bears, namely, the 10th May, 1909. No such suggestion was put to Calvert by the plaintiff, on the other hand, he was cross-examined on the footing that he had written it at the instance of Satyendra and Dr Ashmotosh Das Gupta, which must have been before they left Darjeeling on the 10th May. This does not, however, dispose of the question as to whether the letter was received by Bara Kumar at the time in due course, or as the plaintiff suggests, it was reposing in the custody of Satyendra till he caused it to be found among other papers at the Private Secretary's office at Jaidebpur. Calvert was not asked by either party if he had sent the letter by post, or made it over to one of the inmates of "Step Aside" for delivery to Bara Kumar. The endorsement on the document "Replied", bearing date 20-5-09, if it was made at the time in the usual course, would no doubt support the defendants' case, but as to this, it was definitely put to Rai Sahib Jogendranath Banerjee in cross-examination that this writing was of a much more recent date: the ink looked comparatively fresh, while the writing in the body of the letter was distinctly more faded and discoloured. The writing, again, was with a fine pen which was unusual with the Rai Sahib who admits he preferred broad nibs (*Vol 15, p 517, ll 17-32*). See also *Abani, Vol 16, p 39, ll 1-5*. The suggestion was, of course, denied by the Rai Sahib, but unfortunately he is a witness whose evidence neither carries conviction nor appears to have the ring of truth in it. A very look at the document will show the difference in the ink between the body of the letter and the endorsement, and yet he denies this obvious fact. It may be that the words "Replied 20-5-09" were there when the original letter was sent to England, as appears from the photograph to which Mr Chandhuri referred, but this does not show that they must have been there from the very beginning.

It was also suggested to Rai Sahib Jogendranath Banerjee that the endorsement was not in his handwriting at all. He had to admit that the "5" in "20-5-09" was written in a different manner from how he would write it now. He was shown a number of other condolence letters and telegrams

produced by the defendants, which also contained similar endorsements "replied" (*Ex 373, and Ex 373 (1)—Ex 373 (30)*). Of these there was only one, a telegram from Mr Lyon to Kumar Ramendra Narayan Roy, *Ex 373 (11)*, (*Vol I, p 434*), the endorsement on which he could definitely swear to as being in his handwriting (*Vol 15, p 520, ll 23-24*). As regards the endorsements on the other documents of this series, the handwriting in *Ex 373 (5)*, *373 (9)*, *373 (10)*, *373 (12)*, *373 (15)*, *373 (16)*, *373 (17)*, *373 (18)*, *373 (27)*, *373 (28)* and *373 (30)* looked like his, but he could not swear to it, while he positively denied his handwriting in the rest (*ibid, ll 14-36*). The witness could not help stating that the "5" in Calvert's letter did not resemble the "5" in the telegram from Mr Lyon (*ibid, ll 36-37*). Shown *Ex 2 (205)*, Calvert's letter, he was asked

"Q Do you usually write "5" like that? (Pause)

A Can't say if I wrote that sort of "5" usually " (*ibid, p 521, ll 12-14*)

The whole of the cross-examination of this witness regarding the handwriting of these endorsements ought to be read in order to appreciate the value of this evidence. Speaking for myself, I am unable to say that the plaintiff has not laid a foundation for the suggestion that the endorsement in Calvert's condolence letter was neither a contemporaneous writing nor in the hand of Rai Sahib Jogendranath Banerjee

In her letter bearing date the 5th June, 1921, by which Bibhabati Devi forwarded a copy of the condolence letter to the Board of Revenue, *Ex 2 (260)*, (*Vol II, p 319*), all that she says is that "the letter was discovered in the course of searching the file of old correspondence by the Manager at Jaidebpur"—not, be it observed, the "Condolence file" of which so much is made by other witnesses. It is significant that the Manager's letter to Bibhabati Devi, which may be expected to have given some information as to how, where, or by whom the letter was discovered, has not been produced by the defendants (see the cross-examination of Rai Sahib Jogendranath Banerjee, *Vol 15, p 521, l 29—p 522, l 22*)

WHERE WAS THE CONDOLENCE LETTER?

The real question is whether this condolence letter was at the Private Secretary's office in the Rajbari at Jaidebpur from before May 1921 when it is supposed to have been unearthed for the first time by the Private Secretary's clerk Abani (*D W 324*). On the case of either party, the letter was not sent to Bara Ram in 1917, when, it will be remembered, she asked for all the private papers of her deceased husband which had been lying in the Private Secretary's office to be sent to her (see *Vol II, pp 73, 74 and 174*). It is, however, admitted by the defendants' witnesses that if this letter had been found at the time, it would have been sent to Bara Ram

Thus, Abani says

"If this letter had been found when Bara Ram asked for Bara Kumar's personal letters, it would have been sent then. When she asked for these letters we searched for them"

(*Vol 16, p 38, ll 36-39*)

Mohini Mohan Chakravarty, the Assistant Manager, also says this in cross-examination

"I do not suggest that in 1921 letters addressed to Bara Kumar were at Jaidehpur but the condolence file was with Jogendra Babu. So Jogendra told me, and he showed the file to me. I do not remember if the letters in that file were addressed to Bara Kumar."

(Vol 14, p 412, ll 35-38)

Again

"I do not know whether all papers and letters addressed to Bara Kumar were sent to Bara Ranj long before 1921" (*ibid*, p 413, ll 6-7)

Raj Sahib Jogendranath Banerjee also in a manner admits that the condolence letters would have been sent to Bara Ranj, if these had been found at the time after search

"We had no objection to send the condolence letters to Bara Ranj. I thought it necessary to search for documents in my office before sending the papers wanted by Bara Ranj. At that time I did not find the condolence file after search" (Vol 15, p 519, ll 24-27)

The evidence of this witness regarding the condolence letters is indeed a study in prevarication

On the evidence as it stands it seems to me to be fairly clear that the condolence letter was not at Jaidehpur in 1917 otherwise it would have been sent to Bara Ranj. Admittedly a search was made in the Private Secretary's office at the time, and it is difficult to believe that such a file, if there was one, would have been missed. It is true that the defendants have produced in court a number of condolence letters and telegrams, but there is nothing to show that these came out of the file of "second Kumar's Condolence letters" in which Calvert's letter is supposed to have been found. Mr Chaudhuri did not invite our attention to the statement of a single witness on his side who had said so, though, if the defendants' case is true, the existence of this file as the repository not only of this letter from Calvert, but of other messages of condolence, must have been known to them from May 1921 at the latest, and they must have known as well the plaintiff's case regarding this document which they were called upon to meet. It is only necessary to add that though their witnesses talked so often of the condolence file, the defendants do not appear to have produced the file, as one would have expected them to do at the very first stage when they filed the *Ex 373 series*. As already stated, they no doubt produced some more condolence letters on the 23rd July, 1935 (see their petition of that date, Vol 14, p 440), but the plaintiff very rightly objected to their being taken in at such a late stage. If such a Condolence File did at all exist, the defendants' conduct in respect of it would seem to be quite on a par with what they did in connection with the Darjeeling Sanitarium Condolence File. Then, again, if it is the defendants' case that none of the condolence letters which had been received by Bara Kumar were sent to Bara Ranj in 1917, nothing would have been easier for them than to prove this fact by producing the list, admittedly kept by the Manager, of the documents forwarded to her (*see Ex 65, Vol II, p 74*), but thus they did not choose to do

To put the matter on no higher basis, it may well be stated that the origin and production of Calvert's condolence letter are both shrouded in mystery, and this is a circumstance which cannot be altogether left out of account in assessing the evidentiary value of the document on which the defendants so strongly rely. There still remains the question which was pointedly put by Mr Chaudhuri: why should Calvert, against whom there was no suggestion of bribery or corruption in cross-examination, be writing a false letter regarding the death of the second Kumar and the cause of his death? Even if it be supposed that the persons who procured the letter from him had an ulterior object in view, that they wanted it to serve as a screen for their own misdeeds, that would be no reason for Calvert to be knowingly making false statements in their interest, unless he was in conspiracy with them, of which, however, it was said, there was no suggestion, far less any evidence.

This looks like a poser, but the best answer is the very condolence letter read with other contemporaneous evidence of an unimpeachable character, as well as some further documents emanating from Calvert himself.

WAS CALVERT PRESENT AT DEATH?

So far as the fact of death mentioned in the letter is concerned, Calvert doubtless believed in it, and it is not suggested either that he was making a deliberately false statement, or that those who got the letter from him were seeking to procure false evidence of death. The plaintiff's case is that Calvert was not actually present at the time of death, and any statement of his regarding death, whether in this letter or in his certificate of the 7th July, 1909, must have been based on reports which had been made to him and which he had no reason to disbelieve, having regard to what he had himself seen of the patient. In this letter there is nothing said by Calvert to show that he was present at the time the second Kumar is supposed to have died. Neither is there any such statement in the certificate of death, *Ex Z(111)*, (*Vol I, p 178*). In his examination-in-chief, Calvert was of course very definite about it.

Q—You have signed the certificate of the second Kumar's death.
Were you quite satisfied of the fact of the second Kumar's death?

A—Absolutely certain.

Q—How?

A—The case progressed steadily worse during the day, and he finally collapsed late at night and died. The progress was uniformly downhill until the last when it was sudden.

Q—Did you see the body after death?

A—I saw the man dead and after some time I left.

Q—Were you satisfied that life was extinct?

A—Perfectly satisfied. (*Vol 2, p 203, ll 21-31*)

Mr Chaudhuri made a great point of the fact, as he said it was, that the witness was not at all cross-examined on these answers, and he contended accordingly that this evidence must be accepted as unchallenged. I am afraid, Mr Chaudhuri is wrong. In support of his case that Calvert was not present at the time of death, the plaintiff relies strongly on Calvert's letter to Lindsay of the 3rd August, 1921, *Ex Z*(127), (Vol II, p 350), and this was expressly put to the witness in cross-examination (Vol 2, p 206, ll 16-18, p 207, l 1 and ll 15-20), after which he was asked

"Q—Do you remember if Mr Lindsay asked you if you were present at the death of the Kumar?

A—To the best of my belief he asked me if I recollected the death of the Kumar. He was writing 11 years after the death took place

Q—Did Mr Lindsay ask you if you were present at the death of the Kumar and if you saw the body after death?

A—It is quite possible he may have done so

Q—If Mr Lindsay did enquire of you if you were present at the death of the Kumar and if you saw the body after death, what was your answer?

A—My answer was, I recollected very well his death, but at the moment I could not remember with certainty whether I was present at the moment of death or not

I don't remember any question being asked as to seeing the body after death

(Mr S N Mukerjee (plaintiff's counsel) says the witness's answer shows the existence of a letter from Col Calvert in answer to Mr Lindsay, and he calls for that letter)

(Mr Pringle says that the letter has never been called for, and this is not the time to call for it) (Letter not produced)

(Mr Pringle produces a "brief" copy of a letter which he hands to Mr S N Mukerjee for perusal. Marked for identification "X")

Q—"X" shown to witness. Is that like the letter you wrote to Mr Lindsay?

A—Yes, to the best of my belief this is a copy of the letter I wrote to Mr Lindsay. This letter is dated 3rd August, 1921. To the best of my belief, nothing happened from the 3rd August, 1921, until I heard from Mr Hunter

Q—Did anything happen after you heard from Mr Hunter to help your memory as to the events in Darjeeling?

A—When I saw that I had given a death certificate specifying the time and date of death, I recollected the scene of the death. Previously I had some recollection of the hour, but the fixing of the exact time brought that remembrance back again"

(Vol 2, p 207, l 21—p 208, l 24)

Again

"Q—Were you further told (i.e., in the statement of the case supplied to him) that according to the recollection of the family physician you left the Kumar's house some time after his death and it was not a case of suspended animation?"

A—I remember the first part I don't remember anything about suspended animation" (*ibid*, p 209, ll 18-22)

It is futile to contend after this that there was no cross-examination of the witness, as to his supposed presence at the hour of death

NO INDEPENDENT RECOLLECTION

The letter to Lindsay has been already set out in full, and as I have said before, there is no reason for accepting Calvert's recollection of 1931 as more reliable than that of 1921. In his present evidence Calvert no doubt attempts an explanation by suggesting that the specific mention of the time and date of death in the death certificate brought back to his mind a vivid picture of the scene of death not only, however, is thus a most unconvincing explanation, but it is hard to reconcile it with his own answer previously given, when asked whether he had "any independent recollection of the facts mentioned in the J T C I apart from the certificate itself"

"A—I have a very good recollection because the death of the Kumar made a great impression upon me at the time in that I thought it was an unnecessary death, and that had he agreed to the treatment his death need not have occurred at that time, he being a young man. I remember without seeing the certificate that he died about midnight. From the fact that I have written 11-45 P.M. on the certificate, I am quite certain that the death occurred at that time. I would not have taken any hearsay evidence" (*Vol 2, p 205, ll 25-34*)

He adds

"I was present at any death of which I have given a certificate in Insurance cases or else I saw the dead body after"

(*ibid*, p 206, ll 4-5)

This amounts to no more than saying that as he would not give a death certificate without being present at the death or seeing the dead body afterwards, he must have been present at the death of the second Kumar, because he had given a certificate. In other words, this was not a statement of fact he was making from personal knowledge, but at best an inference from the fact of the certificate itself, which, however, it will be seen, is wholly silent as to whether he was or was not present at the time of death

CALVERT'S LETTER TO LINDSAY

In his letter to Lindsay, not only does he state quite clearly, "I cannot now be certain whether I was present at the moment of his death", but adds, "I saw him shortly before it in a state of profound collapse", and further, that on his last visit, the Kumar's Bengalee medical practitioner was present and arrangements were made for Col Macrae to see the patient in consultation the following morning. The last mentioned facts were obviously facts about which he was "certain", and the reasonable impli-

cation is that Calvert left the Kumar before death when he was in a state of profound collapse, and after arranging for calling in another consultant the next morning in case the patient should still survive. The proposal to call in Col Macrae the next day is admitted by Dr Ashutosh Das Gupta (*Vol 16, p 343, ll 36-37*)

Lindsay's letter to Calvert to which *Ex Z(127)* was an answer has unfortunately not been produced by the defendants. But as already seen, Lindsay had a copy of the death certificate with him at the time, and it is not a violent assumption to make that Lindsay sent a copy to Calvert when he was writing to him in connection with the enquiry regarding the second Kumar's death and illness. Lindsay, of course, throws no light on this in his evidence: he did not remember having received any letter from Calvert, far less having sent him any questionnaire (*Vol 2, p 148, ll 31-34*). His recollection did not revive even after he was shown a copy of Calvert's letter (*ibid, p 151, ll 28-35*). Calvert's recollection is perhaps slightly better, but all that he says is that apparently Lindsay did not send him a number of questions, or else he would have answered them categorically. At first he thought Lindsay had done so, but he could find no trace of any such letter. He had asked for a copy of the correspondence between him and Lindsay to be sent to him to refresh his memory, but he was given only a copy of his letter to Lindsay and no other paper (*Vol 2, p 206, l 20—p 207, ll 1-2*). If, as seems very probable, Calvert was in possession of the death certificate or of its contents at the time he was writing to Lindsay in August, 1921, the particular explanation which is now given for remembering facts which he did not then recollect, becomes wholly meaningless.

CONDOLENCE LETTER NO CONFIRMATION OF DEATH

Mr Chaudhuri admitted an "inconsistency" between the condolence letter and the letter to Lindsay, but said that it was not a material discrepancy, and made a grievance of the fact that the contradiction had not been put to the witness under s 145 of the Indian Evidence Act. There is, however, no merit in this point: it is not a question of contradiction at all, seeing that the condolence letter contains no statement of Calvert being present at the time of death, any more than of the hour of death. In any case, having all but withheld the letter to Lindsay during the examination of Calvert and having in fact examined him in suppression of it, it is not for the defendants to raise any such objection. In my opinion, the cross-examination to which Calvert was subjected regarding this letter was more than sufficient for the purposes of the plaintiff.

Realising the obvious implication of Calvert's letter to Lindsay, Mr Chaudhuri was driven to suggest that all that Calvert meant to say was that he might not have been present in the second Kumar's room at the very moment of death, but if I may use once again the expressive phrase of Satyendra, this was a "suggestion of despair."

So far, therefore, as the condolence letter merely mentions death, and not that Calvert was present at the time of death, I do not think the document can be supposed to hurt the plaintiff at all. As regards the fact of death itself, the letter, if anything, helps the plaintiff's case to a certain extent. It clearly emphasises that the "death" of the Kumar was both sudden and unexpected: it says that the "exacerbation of his illness" came on "suddenly", and also that it "terminated quickly". According to the

defendants, this sudden exacerbation occurred at about mid-day, and the "quick termination" thereafter would be more in accord with death at dusk than with death at midnight

As regards the cause of death, it is also difficult to follow how the statements in the condolence letter, so far as they go, are of any assistance to the defendants. In the first place, the letter does not mention bilious colic, but only "colic", which, as is well known, is a somewhat vague term applied to spasmodic paroxysmal pain situated in the abdomen (*Savill's Clinical Medicine*), and is used by medical men to describe the pain which occurs, not only in intestinal, renal or bilious colic, but also in other abdominal disorders, such as enteritis or dysentery, of which, as any textbook on Medicine will show, "colicky pain" is most often a marked symptom. On a plain reading of the letter, I am unable in fact to find anything in it which may rule out enteritis or dysentery, or even arsenical poisoning in which, as already shown from Price, abdominal pain of a griping or a colicky type occurs as the poison is passed on to the intestines

If the "colic" referred to in the condolence letter be supposed to mean bilious colic, as the defendants contend, it is only necessary to point out that though it may fit in with the two later statements of Calvert,—the death certificate and the letter to Landsay,—it is contradicted by the admitted prescriptions

OR OF CAUSE OF DEATH

There are other indications in the condolence letter which seem definitely to support the plaintiff's case. It will be seen that the letter attributes the sudden death to "a little over-confidence" on the part of the Kumar, which is more fully explained in the concluding portion "he had mild attacks of this nature before, and it was his recovery from these which prevented him realising the serious nature of the last one before it was too late." This information regarding the previous mild attacks could only have been derived by Calvert from the person who went to him for this "testimonial." Calvert must have been puzzled himself as to the cause of death, he had observed certain symptoms and treated for them, but was hardly able to account for the "quick termination" of the illness, and all that occurred to him as a likely theory was "over-confidence" on the part of the patient. He was obviously not in a position to declare at this stage that it was a case of bilious colic. It is also stated in the letter that the "colic quickly ceased under the hypodermic medication"; but death supervened because the system had received a "shock in the interval." The injection was apparently given not long after the colic had come on "in a most intense form", as the letter says, "the shock" must, therefore, have been "received" by the system long before this particular attack, which is supposed to have sent the Private Secretary "round the station" "with praiseworthy zeal" in quest of Calvert. This attack coming on "later in the day" is in fact described as a "relapse", showing that the earlier attack must have been in an equally "intense form", and as the only other visit mentioned in the letter was a visit on that morning, it follows that the Kumar's condition at the time could not really have been "normal" or in any degree satisfactory as the defendants would now have us believe. On Calvert's own statement in this letter, he must have found the Kumar in such a condition on his morning visit that he thought it necessary to suggest an injection—according to him the only "right treatment" for an attack of "colic" "in a most intense form." The Kumar's refusal of such

Kumar before the 6th May, and equally untrue that he had seen biliary colic before the 6th. It follows that Calvert's statement in the affidavit that he was the Kumar's consulting medical attendant at Darjeeling for 14 days must also be rejected as an inspired falsehood (*Vol 18, p. 322*)

"INSPIRED FALSEHOODS"

As regards the date, and particularly the hour, of death, mentioned in the affidavit, it seems to me to be impossible to accept this as an independent statement of Calvert. I have no doubt whatever that he put in these particulars as they were supplied to him by his informant, which it may be assumed he believed at the time. Here, again, it is not necessary to suppose that he was knowingly making a false declaration. If, as I hold, Calvert was not present at the moment of death, he could not possibly give the precise hour from personal knowledge, and as he kept no notes and no diary, the information could have been recorded by him only from hearsay.

EXPLANATION OF "BILIARY COLIC" IN DEATH CERTIFICATE

So far as the mention of biliary colic (gall-stone) as the cause of death is concerned, this must have been Calvert's own statement, and not due to any suggestion or inspiration from some other source. If gall-stone was the real cause of death, it would not, of course, be difficult for him to remember the fact two months later, and one would not be justified in brushing aside his recollection on the ground of lapse of time. The real answer would be only if it could be established on other evidence, not only that the illness was not gall-stone, but that Calvert had not and could not have even wrongly diagnosed it as such. On this point there is, first, his own condolence letter written shortly after the date of supposed death, and then his own evidence coupled with that of the contemporaneous prescriptions and telegrams. The condolence letter, as I have already explained, shows that Calvert at that stage was not sure of anything more than mere "colic",—not biliary colic at all, far less the particular variety of it in which a stone gets impacted in the cystic duct, which is the specific case he came to make afterwards in his evidence. As regards the telegrams and prescriptions, which I have also fully discussed before, the indications, taken as a whole, are not only not in favour of biliary colic, but definitely against it, and Calvert's evidence shows that his treatment could not have been directed to biliary colic.

Calvert's statement in the affidavit can, therefore, be interpreted only as an attempt on his part to give a definite shape to what was really nebulous in his own mind. He had undoubtedly been called in as a consultant to treat the second Kumar, and whether in writing a letter of condolence to the senior member of the family, he might or might not have wished to commit himself on the point, he could not help being more definite when called on to state the "cause of death" in the prescribed declaration form of the insurance company. Not to have been able to particularise the cause of death to the insurance company would have argued a degree of incompetence which no doctor, far less one in Calvert's position, would be prepared to face. On the other hand, if a physician of his standing mentioned a particular illness as the cause of death, there need have been no fear that his statement would not be unquestioningly accepted. There is no evidence that Calvert had heard or been told at the time of any rumours touching the death or cremation of the second Kumar, or had any other reasons to be specially on his guard in giving the certificate, or to anticipate that he might be called upon at any

stage to justify what he stated in it regarding the illness or cause of death of his patient

It will be observed that biliary colic (gall-stone) takes shape for the first time in this affidavit of death, and once it did so, whatever this might have been due to, it is only natural that it should persist in this form in all later stages throughout. This would explain the mention of biliary colic and gall-stone in Calvert's letter to Lindsay, and also account for his trying to adhere to this case in his evidence. Mr Chaudhuri made a great point of the fact that Calvert was not cross-examined on the statements he made in this behalf in his examination-in-chief, but this is true only in the sense that learned counsel for the plaintiff did not tell the witness in so many words "I put it to you that it is not a fact that the illness was gall-stone or that the cause of death was collapse due to colic and pain and the stone impacted in the duct", these being the witness's words in examination-in-chief, (*Vol 2, p 203, ll 19-20*). But reading the cross-examination as a whole, there can to my mind be no doubt that the whole trend of it was to challenge the statement of Calvert as to the nature of the illness or the cause of death. I have no hesitation in saying that Mr Chaudhuri's objection was really one of form, and not of substance at all.

As to the further point made that no suggestion of dishonesty or corruption was put to Calvert in cross-examination to discredit his condolence letter or certificate of death, all that need be said is, in the first place, that for the purposes of the plaintiff's case it was not necessary to ascribe dishonesty or corruption, and secondly, that, even if this was the underlying suggestion, I see no reason why it should have been directly put to him so long as the plaintiff was able to establish that the documents in question could not be relied on at all. Thus, I hold, the plaintiff has been able to do

CALVERT'S THREE DOCUMENTS COMPARED

Taking all the facts and circumstances into consideration, it is difficult, therefore, to attach to Calvert's condolence letter and affidavit of death anything like the importance which Mr Chaudhuri claims for them as contemporaneous documents. The three documents of Calvert—these two, and his letter to Lindsay—seem in fact to destroy one another, and it may be interesting to give a comparative statement showing some of the points in which they differ or agree

- (i) According to the defendants the condolence letter suggests that the Kumar was "better" on the morning of 8th May, but the affidavit of death states that on this morning "the attack became acute"
- (ii) According to the condolence letter the hypodermic injection was given late in the day on the 8th, but none at all could be given according to the letter to Lindsay
- (iii) As regards the Kumar's refusal of hypodermic treatment, the reason given in the condolence letter is his "over-confidence", but in the letter to Lindsay it is prejudice due to his mother having died after an injection
- (iv) The condolence letter seems to suggest that Calvert was called in for the first time on the morning of the 8th, but the affidavit of death says that he was the Kumar's consulting medical attendant for 14 days

- (v) In the affidavit of death it is stated that the Kumar died "the same evening", but the letter to Landsay says that he died "the same night", though rather inconsistently the specific hour 11-45 P.M. is given in the earlier part of the affidavit
- (vi) The letter to Landsay expressly mentions vomiting and purging and non-retention of opium by mouth and rectum, but there is nothing said about this in the condolence letter
- (vii) All the three documents agree, however, in speaking of "collapse"—it being "profound collapse" according to the last one of them
- (viii) The condolence letter merely mentions "colic", but the other two documents both speak of biliary colic and gall stone not a word, however, is said therein about impaction of a stone in the cystic duct, which detail comes out for the first time in Calvert's evidence from his recollection

Before leaving this topic, I might just refer to an interesting fact it is that shortly after judgment in the Magistrate's Court in the Defamation Case acquitting the accused, in which, as already stated, Calvert's affidavit of death and prescriptions had come up for consideration, Bibhuti, a son-in-law of Jyotirmoyee Devi, whose full name is Chandra Shekhar Banerjee (P W 959), took it into his head to send to Calvert in England a copy of the judgment by a letter dated 13th September, 1923, which is *Ex Z(371)* (Vol III, p 348) "My intention", wrote Bibhuti, "in communicating to you these circumstances is that you may know how things were manipulated without your knowledge" This elicited from Calvert a laconic reply dated 8th October, 1923, which was tendered during Bibhuti's examination, but not admitted by the learned judge at that stage (*see Vol II, p 28, ll 9-15 and p 32, ll 20-29*) The reply was placed before us, and was in these terms "I am much obliged to you for your letter of 13th September, 1923 and enclosure *It is certainly interesting*" Calvert was not asked about this letter in cross-examination, but apparently when he was writing this, he was still in the same state of mind as is disclosed by his letter to Landsay of 3rd August, 1921

It may be worth while in this connection also to call attention to a fact already noticed, namely, that in writing to the "Englishman" of the 9th May, 1921, to contradict the report, which had appeared in that newspaper under the heading "Dacca Sensation" shortly after the declaration of identity, Satyendra merely stated that he was personally present at the time of the death of the Kumar and did not say anything about Calvert having been present as well, or even refer to Calvert's death certificate The only reference he made to Calvert in this letter was for the purpose of saying that he had attended the Kumar in his last illness, and the only death certificate mentioned was that given by Mr Crawford, Deputy Commissioner of Darjeeling (*see Satyendra's cross-examination, Vol 16, p 940, ll. 22-29*)

CRAWFORD'S CERTIFICATE

As regards this certificate of Crawford, which is dated the 8th February, 1910, and on which the defendants rely, if not to the same extent as on that of Calvert, it is impossible to pass it over without comment It states as follows —

"This is to certify that Kumar Ramendra Narayan Roy of Bhowal, Zemundar of the District of Dacca, aged about 27 years, stopped at

the house named "Step Aside", Darjeeling, and died there on the 8th day of May, 1909, from an acute attack 'of 'biliary colic' " (*Ex Z(113), Vol I, p 187*)

Crawford was admittedly nowhere near the second Kumar when he is supposed to have died, and yet he gives a certificate of death as if the facts stated in it were within his personal knowledge! Crawford said in cross-examination "I do not know who asked for it I do not remember at all the circumstances under which I gave the certificate, nor how the details came to be in it" (*Vol 2, p 226, ll 28-30*)

Mr Chaudhuri quoted from an old edition of Lyon's "Medical Jurisprudence", (5th ed, p 122) to show that no doctor would give a certificate of death without being actually present at the time of death or without seeing the body, and asked the court to infer from this that Calvert must have been present at the second Kumar's death because he did give a death certificate. Leaving aside for the moment the fact that Calvert's certificate was given, not immediately after death, but two months later, here was, on the defendants' own showing, another person, who, though not a doctor, was still a responsible officer, and to boot a Justice of the Peace, giving a death certificate without pretending to know anything about the death! This only shows, say what Mr Chaudhuri might, how easy it must have been for his clients to procure certificates, and affidavits to order, and he must forgive the plaintiff if the plaintiff invites the court not to attach to these documents the sanctity which they might superficially appear to possess.

On the question of the second Kumar's illness, in addition to the evidence already referred to, the defendants have examined a number of witnesses besides Bibhabati Devi, Satyendra and Dr Ashutosh Das Gupta, such as Bepin Khansama (*Vol 14, pp 487-505*), Birendra Chandra Banerjee (*Vol 15, pp 314-377*), Anthony Morel (*Vol 2, pp 367-431*), Jagat Mohini (*Vol 1, pp 281-299*), and Shyamadas Banerjee (*Vol 1, pp 255-278*). The first three, Bepin, Birendra and Anthony Morel, were members of the second Kumar's party, who had gone with him to Darjeeling. Jagat Mohini was a local nurse, attached to the Victoria Hospital there, who was brought along by Dr Nibaran Sen to attend on the Kumar on the last day of his illness. Shyamadas was a cousin of Satyendra, who was a clerk in the Bengal Secretariat, and was at Darjeeling in May, 1909, staying at the Cutchery Building there, which was the official quarters for Secretariat clerks. The evidence of these witnesses, so far as the nature or course of the illness is concerned, is of little value, and Mr Chaudhuri himself has not laid much stress on it. They do not carry the defendants' case on this particular point any further than the principal witnesses, whose evidence has been already considered, but it will be necessary to refer to their evidence in connection with some other topics. It is enough to say that they are witnesses who do not inspire much confidence. One of them, Anthony Morel, as we have seen, actually spreads out the Kumar's illness over a period of 10 or 12 days.

CHANGE OF BED-ROOM ON 7TH NIGHT

In support of his case of poisoning, Mr Chatterjee on behalf of the plaintiff laid some emphasis on a fact stated by his client in his evidence regarding the conduct of Satyendra and Dr Ashutosh Das Gupta on the night of the 7th May, which these witnesses were afterwards compelled to admit in cross-examination, though under considerable pressure. It was

conduct, said Mr Chatterjee, which was wholly incompatible with innocence, and could not but be suggestive of a felonious design on the part of these two persons. The plaintiff, giving evidence at a time when he could not possibly anticipate what these witnesses of the defendants were going to say, made the definite case that following on the administration of some medicine by Dr Ashutosh Das Gupta at about 8 or 9 p.m. on the evening of the 7th May, he felt a burning sensation in his chest, vomited, and grew restless, and then began to scream in pain, but no doctors came that night (*Vol 4, p 101, ll 18-23, p 162, ll 11-15, and p 170, ll 8-10*). Satyendra and Dr Das Gupta, who of course could not, in view of *Ex 51(a)*, the arsenic prescription, eliminate pain altogether on the evening of the 7th, both tried to make out first that it was only slight pain, but, as has been pointed out before, they were constrained to admit later that the Kumar was really in very great pain, and yet neither Dr Calvert nor Dr Nibaran Sen was sent for. On the other hand, Satyendra and Dr Das Gupta went to bed as usual that night, sleeping in the same room as if nothing had happened. Dr Das Gupta's evidence on the point has been already quoted (*Vol 16, p 279, ll 35-37, p 284, ll 3-4, and p 334, l 32—p 335, l 5*). Reference has also been made to Satyendra's cross-examination to show how he struggled hard before admitting that the Kumar "rolled about in bed after dusk on the 7th in pain" (*Vol 16, p 496, ll 10-14*). He first stated to Mr Chaudhuri that the Kumar's bed-room was changed at his own suggestion possibly on the day before his death. This was done because, he said, when the pain would come on, the Kumar "rolled about in bed", and the cot he was lying in was too narrow, and the Kumar himself proposed that a wider bed should be spread on the floor of the adjoining room, which happened to be unoccupied (*ibid, p 428, ll 7-13*). In cross-examination he first said that no such pain occurred on the 6th, and further admitted that it was not his evidence that the Kumar rolled about in bed in the day time (*ibid, p 467, ll 39-41, and p 468, l 35*). Still he denied that the bed was removed on the night of the 7th (*ibid, p 468, ll 1-3*). It was later put to him

"Q—You know perfectly well that the Kumar had to be removed on the evening of the 7th because his pain was terrible?"

He of course answered "No. So far as I remember, he was not removed on the evening of the 7th." He could not suggest, however, that the Kumar asked to be removed when he had no pain, and then forgetting his previous statement that the Kumar was removed at his own suggestion, said "He was removed as I thought the pain was going to be a big pain, and moreover he had been in the same bed for so many days, so that a change of bed would give him more comfort. I can't recall how long before this removal a change of bed occurred to him."

"Q—You know perfectly well that what you anticipated as big pain did come on?"

A—No big pain came on the 7th" (*ibid, p 475, ll 15-26*). Finally, however, came the admission, already referred to, that the Kumar did roll about in bed after dusk on the 7th in pain.

So far as Satyendra himself was concerned, on the 7th night he went to bed as usual, i.e., at 10, and fell asleep at about 12 (*ibid, p 466, ll 31-32*).

It is not necessary to labour the point, which Mr Chatterjee wanted to make out of this evidence, as to whether or not this indicated a conspiracy to poison on the part of Satyendra and Dr Ashutosh Das Gupta, but there

can be no doubt that sufficient indications are given by both the witnesses which lend support to the account which the plaintiff gave of the night of the 7th May

It is perfectly clear, as the learned judge says (*Vol 18, pp 335-336*), that the Kumar was removed in pain from his bed-room to the next room during the course of the night, and this, as he points out, is in a way supported by the evidence of Shyamadas Banerjee, who came to see the Kumar at about 6-30 P.M. on the 7th evening and found him in 'great pain, and on receiving information in the early morning on the next day that the Kumar was restless' on the previous night, went to see him that day on his way to office, and found him in "another room"—not the room where he had seen him before (*Vol 1, p 267, ll 11-14 and ll 20-23, and p 268, l 39—p 269, l 1*). It is also clear that neither Calvert nor Nibaran Chandra Sen came to see the Kumar on the 7th night, and he was left practically unattended by both Satyendra and Dr Ashutosh Das Gupta

On a review of the whole evidence on the subject, I have, therefore, no hesitation in accepting the conclusion of the learned judge on the first topic in the Darjeeling Chapter—the nature and course of the Kumar's illness. The illness was not biliary colic and the symptoms, which the Kumar developed from the 7th night onwards, were distinctly suggestive of arsenic poisoning

2 CAUSE OF THE KUMAR'S DEATH OR APPARENT DEATH

This really disposes of the next topic in this chapter—the cause of the Kumar's death or apparent death, but Mr Chaudhuri complains that the learned judge did not consider the question as to whether the Kumar actually died or merely fell into a comatose condition, which was mistaken for death, as an independent question of fact. I find a little difficulty in appreciating this comment, for the answer is to be found in the learned judge's treatment of the other particulars of the case. It is idle to expect that the plaintiff should be able to give positive evidence that at the moment the second Kumar is supposed to have died, life was not actually extinct, but that he exhibited false or deceptive signs of death. The best proof of this can only be the evidence of subsequent facts, which ultimately resolves itself into the evidence of identity, and as the plaintiff has sought to prove identity *abundantly*, it should, in my opinion, be sufficient if he can merely repel the defendants' evidence of death. Thus, I consider, the plaintiff can do, and has in fact done, by showing that the evidence which the defendants have adduced to prove death is not worthy of acceptance. The defendants have come forward with a definite story as to what caused the second Kumar's death, and to the extent to which that story is shown to be unacceptable, it must be taken to be advancing the plaintiff's case on the point. It cannot be said that, apart from the oral testimony of their witnesses, who have merely stated that the Kumar died, and from certain contemporaneous statements to that effect, the defendants have established any facts beyond all reasonable doubt, which must inevitably negative the plaintiff's case as a physical impossibility or improbability. Calvert, as already pointed out, no doubt said in his examination-in-chief that he was "perfectly satisfied" that "life was extinct" (*Vol 2, p 203, ll 30-31*), but this evidence would obviously have no value, if, as I hold, he was not actually present at the time of "death". The plaintiff has, on the other hand, succeeded in laying a

foundation in the evidence for the acceptance of his case as being not outside the range of probability. The medical authorities show that death seldom ensues as a result of the impaction of a stone in the cystic duct in biliary colic. Col MacGulchrist says that he has not come across a case of death by biliary colic (*Vol 9, p 363, l 28*), and Dr Bradley has never known of a case of biliary colic ending fatally (*Vol 11, p 353, ll 33-34*). It was also elicited from Calvert in cross-examination that the Kumar had some minor attacks on and off, finally culminating in his fatal seizure, which he was not anticipating (*Vol 2, p 219, ll 13-14*), and in re-examination he made it clear that it was not the attack that was unanticipated, but it was the fatal result of that attack, *because such results were rare* (*ibid, p 224, ll 22-23*). In his condolence letter as well as in his letter to Landsay, he again expressed a more or less similar view, namely, that the death was wholly unexpected. Calvert admitted that the Kumar had fallen into a state of collapse, and the chances of recovery after collapse were not wholly rare.

"Q—Do you agree that people can survive after collapse?"

A—Yes, it depends on what the collapse is due to. I also know of the recovery of pulseless patients, and I agree that acute arsenical poisoning brings collapse" (*ibid, p 220, ll 24-27*).

It is hardly necessary to refer to the evidence of Satyendra or Dr Ashutosh Das Gupta, both of whom of course say that Calvert pronounced the Kumar dead. The former is content with a mere statement to that effect (*Vol 16, p 428, ll 32-35*), but the latter gives a more graphic description of the matter.

"Q—How did you know that death had occurred?"

A—Dr Calvert examined his heart, pulse, abdomen and lungs, and said "Expired." Dr Calvert examined him for five or seven minutes or three or four minutes. Dr Nibaran Sen examined the heart, pulse, abdomen, and put his finger at his nostrils to see if he was breathing—did all this for three or four minutes. I too examined the heart, pulse, abdomen, and found him dead" (*Vol 16, p 243, ll 24-29*).

Calvert himself did not vouchsafe these details. According to the nurse Jagat Mohini, it would appear that it was not necessary for Calvert to examine the patient so minutely in order to pronounce him dead. Her evidence is that "the condition of the Kumar suddenly took a bad turn" after Calvert had gone away for dinner on the evening of the 8th, and the Ram started crying, when Calvert was sent for, and he "came in great haste" at 10 or 11 P.M., and examined the patient. The Kumar was not yet dead, but was in his last gasp and was uttering a groaning sound from the throat.

"Q—When there was the groaning sound, where was the Doctor Sahab (Civil Surgeon)? Was he observing it?"

A—The Doctor Sahab was near by. On kneeling down and looking at the watch he was feeling the pulse; he was examining the chest and observing the breath. Everything was then finished" (*Vol 1, p 294, ll 18-37*).

As has been already pointed out and as will also appear more fully hereafter, it is difficult to accept the story of death taking place at about midnight or of Calvert being present at the hour of death, as deposed to by

these witnesses In my opinion, there can be no reason, therefore, for rejecting the plaintiff's case that the second Kumar passed only into a state of apparent death, merely because the plaintiff has not been able to adduce affirmative evidence on the point

3 HOUR OF ALLEGED DEATH

The next question to be considered is one of vital importance in the case, namely, the hour of death or supposed death of the second Kumar, for the whole of the plaintiff's story depends on whether it took place in the evening of the 8th May as opposed to midnight, the time alleged by the defendants I do not think the precise hour in the evening when this event occurred is very material, and in my opinion, the direct evidence on the plaintiff's side is not at all shaken, merely because of certain discrepancies in the timings given by the witnesses as to when they received the news of death, or turned up at "Step Aside" and saw the body, or saw or joined the funeral procession Such discrepancies are perhaps inevitable in the testimony of witnesses deposing to events years afterwards, and I should rather consider this to be a circumstance which goes to show that they are giving truthful evidence

The learned judge has, in my opinion, given overwhelming reasons for holding that the Kumar apparently died between 7 and 8 p.m. on the 8th May, 1909 (*Vol 18, p 355, ll 18-19, p 362, l 24, and p 364, ll 11-12*), and I may state at once that I see no ground for not accepting his conclusion

Mr Chaudhuri complains that the learned judge has arrived at his finding without taking into account the considerable body of oral evidence which the defendants have adduced to prove death at midnight, except referring to the evidence of Calvert and casually to that of Bibhabati Devi, but I am not at all satisfied that this is a legitimate criticism The defendants' oral evidence comes from two classes of witnesses those who say that they were present at "Step Aside" at the time of death, and others who are supposed to have received the news of death shortly after at their own lodgings Besides Bibhabati Devi and Calvert, the first category includes Jagat Mohun (*Vol 1, p 281, l 25*), Bepin Khansama, D.W. 140 (*Vol 14, p 491, ll 20-33*), Birendra Chandra Banerjee, D.W. 290 (*Vol 15, p. 318, ll 34-35*), Dr. Ashutosh Das Gupta, D.W. 365 (*Vol 16, p 243, l 2*), Anthony Morel (*Vol 2, p 378, l 29*), and last but not the least, Satyendra (*Vol 16, p 428, l 31*) The second group of witnesses includes two persons who were staying at the Lewis Jubilee Sanitarium, Rajendra Nath Sett and Tinkari Mukherjee, and two at the old Cutchery Building, Shyamadas Banerjee and Durga Charan Pal, besides one Kali Chhatrin, daughter of the *chowkidar* of "Step Aside", who lived with her father in the servants' godown at that house Rajendra Sett's evidence is that he received a note from Satyendra at about 1 a.m. in the night reporting the death of the Kumar (*Vol 1, p 301, ll 4-8*), and Tinkari Mukherjee says that he came to know of it from Rajendra Sett at 1 or 1-30 a.m. (*Vol 1, p 434, ll 5-16*) Shyamadas Banerjee in his turn says that he got the news from "Step Aside" at 1 or 1-30 a.m., and on going there shortly after, heard that the Kumar had died at 11-30 or 11-45 p.m. (*Vol 1, p 256, ll 8-17*), while Durga Charan Pal says he heard about the death from Shyamadas after midnight (*Vol 13, p 146, ll 25-30*) Kali Chhatrin, who was a very young girl at the time, states that her father woke her up at midnight to tell her of the Kumar's death, and speaks to a peculiar custom

to explain this unusual action on the part of her father "My father awoke me, as upon a death occurring children are not allowed to sleep. They have to be roused once and told, "A man is dead", before they go to sleep again" (Vol 14, p 427, ll 1-5, and p 431, ll 6-16)

As regards these witnesses, in the first place it is not correct to state that the learned judge has ignored them completely. In discussing the question of the time of death or of the cremation processions, he has in fact referred to the evidence of many of these, if not to their specific statements regarding the hour of death, as the following references, among others, will show —

- (1) Satyendra (Vol 18, p 355, l 34 to p 356, l 10, p 357, ll 6-18, p 359, ll 1-15, p 362, ll 21-22, p 363, ll 5-6 and p 363, ll 13-17)
- (2) Dr Ashutosh Das Gupta (*ibid*, p 356, l 21, p 357, l 4, p 362, l 43, p 363, l 3 and p 364, ll 4-10)
- (3) Birendra Chandra Banerjee (*ibid*, p 357, l 4, p 363, ll 10-13 and p, 364, ll 1-4)
- (4) Bepin Khansama (*ibid*, p 363, l 10)
- (5) Jagat Mohini (*ibid*, p 363, ll 17-18 and 22-32)
- (6) Rajendra Nath Sett (*ibid*, p 385, ll 16-22)
- (7) Shyamadas Banerjee (*ibid*, p. 363, ll 32-34, p 385, ll 10-16)

Secondly, so long as it appears that the learned judge has not omitted to consider the evidence of the defendants' principal witnesses on the point, one fails to see how his conclusion can be assailed merely because he may not have referred to every other witness who repeats the same statement and does not really carry the case any further, particularly in view of the concatenation of circumstances referred to by the learned judge which undoubtedly point the other way. There is nothing to show that the learned judge was unmindful of the evidence of these other witnesses, but apparently he was not prepared to accept their statements as independent corroboration of the time of death.

It is worthy of note that of the plaintiff's witnesses who give direct evidence as to the time of supposed death, the learned judge refers only to Ram Sing Subha, P W 967 (Vol 11, pp 65-83), though there are at least two other witnesses on the point to whom reference might equally have been made, namely, Chandra Singh, P W 968 (Vol 11, pp 84-94) and Mahammad Ashraf Alam, P W 980 (Vol 11, pp 246-251).

DEFENDANTS' DOCUMENTARY EVIDENCE

There can be no doubt that in support of their case of death at midnight, the defendants rely mainly on Calvert's affidavit of death and on his evidence in so far as it purports to accord with it. The affidavit mentions 11-45 P.M. as the specific hour of death, but for reasons already explained, it is hardly possible to attach any value to it as an independent statement of Calvert. As for his oral evidence, it obviously fails to carry conviction. He was asked if he had any independent recollection of the facts stated in the certificate of death, and his answer was that he remembered without seeing the certificate that the Kumar had died at about midnight, giving it as his reason for having "a very good recollection" of the facts, that the death of the Kumar had made "a great impression" upon him at the time in that he

thought that it was an unnecessary death. On seeing the certificate, he only "felt certain" that death had taken place at the precise hour mentioned in the document (*Vol 2, p 205, ll 25-32*). It is, however, remarkable that writing in 1921 in reply to Landsay's enquiry, although there was then the same stimulus to his memory, namely, this "great impression" produced by the event, he could not still be certain whether he was present at the moment of death (*Ex 2 (127), Vol II, p 350*). One finds it difficult, therefore, to disagree with the learned judge that when Calvert said that he had an independent recollection of the time of death, he was not telling the truth (*Vol 18, p 355, ll 12-13*).

Calvert's letter to Landsay, as I have shown before, practically gives the lie to the defendants' story of death at midnight—by clearly establishing these facts among others

- (1) that Calvert was not present at the moment of alleged death,
- (2) that when he left after his last visit the patient was still alive, but "in a state of profound collapse",
- (3) that the Kumar's condition was so grave that it was arranged to call into consultation a senior physician Col Macrae,
- (4) that the consultant was not given a call that evening, but was to be brought only next morning, that is to say, only if the Kumar survived till then, and
- (5) that the Kumar died shortly after Calvert had left

Admittedly Calvert left in the evening—at may be, according to Bibhabati, only for dinner, with the idea of returning later, and according to Jagat Mohini, as we shall see, at about 6-30 P.M., only to be called back by reason of the Kumar's condition taking an unexpected turn for the worse

DIARY ENTRY

The defendants rely also on the entry made by Satyendra in his diary under date the 8th May, 1909 "Kumar Ramendra expired midnight" (*Ex 399 (1), Vol I, p 306*), but the diary stands self-condemned. It is only necessary to refer to the anxiety which Satyendra himself shows to deny the correctness of the statement he makes in the very next sentence where he writes

"4 doctors attended, one his family doctor Ashutosh Das Gupta 2 Rai Bahadur Nibaran Ch Ghosh (sic) 3 B B Sarkar, M.D 4 Lt-Colonel Calvert. They were all attending when he died".

The presence of Dr B B Sarkar at the time of death would of course cut across the defendants' case as now made by them, and so Satyendra has no hesitation in saying in his present evidence that it is "false" that Dr B B Sarkar was attending when the second Kumar died (*Vol 16, p 477, ll 20-21*). As regards the entry in the diary, he says quite complacently that he wrote it "loosely" (*ibid, l 27*). This is only an euphemistic way of saying that Satyendra wrote what he knew to be false. Surely the defendants cannot be permitted to accept one portion of the diary and reject another, according as it suits or does not suit their present purposes. Mr Chaudhuri attempted a feeble explanation of this entry by suggesting that Satyendra was merely giving a list of the doctors who attended the Kumar in his last illness, not necessarily of those who were present at the actual time of death, but apart from the fact that the entry itself shows the contrary, such explanation is ruled out by the answer which the witness himself gave

when he said that it was "a list of doctors who attended the Kumar at the time of his death" (*ibid*, II 34-35) In my opinion the diary is demonstrably such a mixture of truths and untruths that it would be no more safe to rely on it than on the evidence of the writer in support of the defendants' case of death at midnight

There is some further documentary evidence on the defendants' side which Mr Chaudhuri refers to as showing that death at midnight had got into contemporary records before there was any possible chance of anybody interfering with the same. The learned judge has considered this evidence towards the end of the Darjeeling chapter of his judgment before he takes up the question of rescue (*Vol 18, p 393, II 4-36*), but Mr Chaudhuri is apparently not satisfied with the way in which he deals with it. Mr Chaudhuri seems to think that the learned judge simply "cuts through" this body of evidence by making a dash for the assumption of identity, but as I have already pointed out, he does nothing of the kind. After referring to these documents, he in fact expresses his conclusion in terms which are quite definite and have nothing to do with the question of identity. "All these facts", says the learned judge, "are swept away by the facts I gave which show that the apparent death was at night, and the body was taken out at night" (*ibid*, II 35-36), meaning by "night" a little after dusk, as already stated by him.

KALIGANJ SCHOOL RESOLUTION

One of these documents is a condolence resolution of the Kaliganj School Committee, of which, it is said, the second Kumar was President (*Ex Z(223) (2), Vol I, p 424*). The resolution which is dated the 10th May, 1909, no doubt mentions midnight of the 8th May as the hour of the Kumar's death, but apart from the fact that it would be very unusual to record the specific hour of death in a condolence resolution, the evidence as to how this information is supposed to have been received at Kaliganj, is, to say the least of it, of a most suspicious character. The defendants have not examined anyone who was present at the meeting at which the resolution is said to have been passed, but one Rai Sahib Umesh Chandra Dhar, D W 348, is called to prove that the proceedings are in the handwriting and over the signature of a person named Protap Chandra Kar, who is supposed to have presided at the meeting and has since died (*Vol 16, p 147, I 32 and p 148, I 2*).

It is true, as Mr Chaudhuri points out, that there was no cross-examination regarding this handwriting and signature, but the witness is otherwise so thoroughly discredited that I do not think the absence of such cross-examination can really make any difference. Before he gave his evidence in court, the witness had been examined on commission (*Vol 16, p 149, I 6*), and he admits that in his examination-in-chief on commission he said that he was at Kaliganj at the time of the second Kumar's death and that a telegram had then come to the Naib of the Kaliganj cutchery from the Raj Estate office at Jaidebpur, conveying not only the news of death but the further detail that the death had occurred at midnight, and that on receipt of this telegram the Naib read it out to the witness (*ibid*, p 155, II 11-15, and p 156, II 24-26. See also his previous deposition, *Exs 392 and 392(1), Vol. III, pp 394 and 395*). It was, however, elicited from him later in cross-examination that there was no telegraph office at all at Kaliganj at the time one came to be established long afterwards when the Tangi-Bharab Branch line of the Assam-Bengal Railway was opened, which, according to the

witness, was some 15 or 16 years before he was deposing (*ibid*, p 159, ll 15-17) After this, very little remains of the evidence of this witness, and whether or not there was any cross-examination regarding the handwriting or signature of Protap Chandra Kar in the proceedings book, I cannot say that the learned judge was wrong in refusing to place any reliance on the condole resolution It is worth pointing out, as the learned judge notes (*Vol 16*, p 153, ll 22-23), that the proceedings book itself from which the resolution was produced was in a tattered condition with the covers torn off and the pages loose

It is said that the proceedings were confirmed at a subsequent meeting of the School Committee held on the 12th May under the chairmanship of one Parsanath Nag The minutes of this meeting (*Appendix Volume*, p 242) have not been proved, but only the signature of the chairman through the same witness who proved the proceedings of the 10th May (*Ex Z*(223) (3), *Vol. I*, p 445) Mr Chaudhuri made a point that this Parsanath Nag was examined as a witness by the plaintiff as P W 61 (*Vol 4*, pp 475-480) after D W Rai Sahib Umesh Chandra Dhar had already in the course of his commission evidence disclosed the proceedings of the 12th May, and still the plaintiff made no attempt to obtain from him a denial of his signature appearing in these proceedings as chairman of the meeting It will be seen, however, that P W 61 is one Parsanath Nag Biswas who was President of the Buktearpur Union Board, and not Parsanath Nag, member of the Kalganj School Committee, who is alleged to have presided at the meeting Rai Sahib Umesh Chandra Dhar himself admits that these two were different persons

"I know Parsanath Nag of Buktearpur His house is a little less than 3 miles from my house I do not remember his father's name He was a member of the School Committee There is another Parsanath Nag Biswas He was President of the Buktearpur Union Board" (*Vol 16*, p 148, ll 3-7)

Curiously enough, this witness identified the signature in the proceedings of 12th May as that of Parsanath Nag Biswas! (*ibid*, p 148, ll 7-9)

ESTATE CIRCULAR

The next document is an estate circular dated the 10th May, 1909 which is said to have been issued from the sudder office at the Jardebpur Rajbari, directing the closing of mofussil or Dehi cutcheries on account of the death of the second Kumar, and in which also, significantly enough, the hour of death is mentioned as "midnight of Saturday last" (*Ex Z*(154), *Vol I*, p 423). The learned judge is apparently not impressed with the genuineness of the circular, of which a lithographed copy has been produced, addressed to the "Mohurrir of Dehi Baher Ghata" The defendants have called two witnesses to prove this document, one Basanta Kumar Bal, D W 77, (*Vol 13*, pp 295-308), and the other, Barada Charan Roy Chowdhury, D W 308 (*Vol 15*, pp 418-428). There is no explanation why the original of the circular could not be produced from the sudder office Barada Charan Roy Chowdhury admits that copies of communications sent out from the sudder to Dehis were kept at the sudder office, and expressly states that the original of this particular circular was there (*Vol 15*, p 422, ll 28-30 and ll 38-39) The copy which was put in evidence was not produced even from the Dehi office, but from the custody of Basanta Kumar Bal who had admittedly left the Raj service long ago He was, as he says, the "in-charge Naib" of Baher Ghata at the time (*Vol 13*, p 295, ll 38-39), and it is not at all clear why he should have taken away this document with him, though not addressed to him, when he left that

cutchery According to his evidence this and some other papers which he produced were not important enough to be kept in the cutchery, but "fit to be thrown away", all the same they "got carried" with him in his "hand box" "by mistake" (*ibid*, p 301, ll 3-17) It is still more remarkable that he should have preserved these unimportant papers in his hand-box ever since to be unearthed by the defendants, presumably by some lucky intuition, for, he says that when he found these papers in the box, he did not write to the Bhowal estate to say that they were with him If such a circular had in fact been issued from the Rajbari, copies must have been sent out to other Delhi cutcheries as well, but no such copies have been produced by the defendants One would also expect similar circulars to have been issued on the occasion of the death of Bara Kumar and Chota Kumar, and this is in fact admitted by both the witnesses, but none are forthcoming Basanta Kumar Bal admits that letters received from sudder were entered in a Receipt Register at the cutchery and the entries were serially numbered, (*ibid*, p 304, ll 11-12), but no Receipt Register has been produced, nor is any serial number to be discerned on the circular (*Ex Z(154)*), quite significantly, the edges of the paper are intact, except at the top left-hand corner where the serial number should have appeared (*Vol 15, p 423, ll 6-7*)

In this state of the evidence, it is not at all surprising that the learned judge should refuse to place any reliance upon this circular Mr Chaudhuri laid great stress on the fact that the document bore the initials of Shyama Prasad Roy, the Sudder Naib, who had died long before, and that part of the document, namely, the direction to the Mohurrir of Delhi Bahar Ghata, was in the handwriting of another person who was also dead, namely, Srinath Biswas who is said to have been the *jamanadris* of the estate (*Vol 13, p 296, ll 4-15 and Vol 15, p 419, ll 12-17*) It was suggested that the handwriting of these dead persons was the strongest proof of the genuineness of the document Speaking for myself, I am not prepared to place much reliance on the evidence of these two witnesses of the defendants regarding the circular, specially in view of the suspicious circumstances in which it came to be produced

CUTTING FROM THE "BENGALÉE" NEWSPAPER

Mr Chaudhuri also refers to a cutting from the "Bengalee" newspaper dated the 11th May, 1909, purporting to contain a report from Darjeeling under date May 9, 1909 "from our own correspondent", in which it is stated that "the second Kumar of Bhowal breathed his last at about midnight yesterday" (*Ex Z(245) Vol I, p 443*) There is nothing to show who sent the report or when it was sent or how it came to be published, neither the "own correspondent" nor anyone connected with the newspaper has been called to prove it An issue of the "Bengalee" of this date was shown to a witness for the plaintiff, Padmuni Mohan Neogy, P W 655, sub-editor of this newspaper, who was then on leave and staying at the Lewis Jubilee Sanitarium at Darjeeling, and he said in cross-examination that "own correspondent" may mean anybody, even an outsider (*Vol 8, p 252, l 30*) Only a certified copy of an extract from this paper containing the above report was afterwards put in without being formally proved and without any evidence as to who certified it or what authority he had to do so It is difficult to see how in these circumstances it may be accepted as evidence of the time of death Incidentally, it will be noticed that the report mentions "fever with loss of blood and pain in the abdomen", and not "bilary colic" as the cause of the death

Instead of relying on documentary evidence of such dubious value, the defendants would have really helped their case, if they had produced the telegram which had admittedly been sent from Jaidebpur to Bara Kumar, announcing the death of the second Kumar. It will be remembered that Mr Chaudhuri sought to explain its non-production by suggesting that it was in the possession of Sarajubala Devi, the Bara Rani, having been sent to her along with other papers which she had called for from Needham in 1916 (see Vol II, pp 73, 74 and 174), but as I have explained before at some length, I fully accept the learned judge's conclusion that the document was in the custody of the defendants and not of the Bara Rani. It remains to add that by a petition dated the 21st April, 1931, the plaintiff actually called for from Bibhabati Devi and Satyendranath Banerjee, among other documents, all telegrams which they had either sent or received in connection with the second Kumar during the months of April and May, 1909 (Vol I, pp 462-463), but there was no response. On behalf of the defendants, Mr Chaudhuri referred to a petition filed by his clients on the 27th April, 1932, by which they called for the originals of certain telegrams of which they gave a list, from the officer-in-charge, Telegraph Check Office, Calcutta (Vol 2, p 432), but apart from the fact that the Paper-book does not show whether the telegram of death was included in the defendants' list, it must have been known that this was a wholly useless proceeding, as under the rules of the department the originals would not be preserved in the Telegraph Office after such a long lapse of time.

Learned counsel for the defendants made a piquant comment regarding this telegram which, according to him, mentioned "midnight" as the hour of death even if it was forthcoming, said he, there would have been nothing to prevent the trial judge from saying that it was false like the telegrams of illness. Mr Chaudhuri, however, forgets that if the plaintiff's case is true, the telegram must have been despatched before it became necessary for the defendants to invent "midnight", and if a telegram had already been sent before midnight, there could not very well be another later on, stating "midnight" as the hour when the Kumar had died. In case, therefore, the defendants were able to produce a telegram which showed "midnight" as the hour of death, it would obviously not have been open to the learned judge, even if he was minded to do so, to reject it summarily as false. Such a telegram would, on the other hand, have almost conclusively proved the defendants' case by ruling out *ipso facto* the possibility of another message giving an earlier hour of death, but the fact remains, as already stated, that no such telegram was produced by them.

DEATH TELEGRAM—ITS SIGNIFICANCE

A "telegram of death" being admitted on the defendants' side, it was certainly for them to prove when or by whom it had been sent, even if they were unable to produce the original, this being a fact within their special knowledge. The significance of this telegram must have been apparent to them from the beginning, and they could not have been in any doubt as to the case the plaintiff had been making about it. On the plaintiff's part it would have been quite enough to show that the telegram must have been despatched before midnight, as this would have at once wiped out the defendants' case regarding the hour of death. It would naturally, however, be very difficult, if not impossible, for the plaintiff to adduce direct evidence on the point. Direct evidence to the contrary might more easily come from the defendants. But what do we find?

As we have seen, the plaintiff called for the original of the telegram from the other side, but failed to obtain production of it. The court thereupon allowed him to give secondary evidence, as it afterwards allowed the defendants also to give similar evidence of the contents of the telegram, pending a decision of the question as to the party in whose possession the document was (*Vol 18, p 358, ll 11-17*). Plaintiff's witnesses who speak to this telegram are Jitendra Chandra Mukherji, *alias* Billoo, P W 938 (*Vol 10, pp 298-369*), and Sati Nath Banerji, *alias* Sagar, P W 977 (*Vol 11, pp 167-236*), the former being a son of Indumoyee Devi, and the latter a son-in-law of Jyotirmoyee Devi. They both say that on receipt of the 3-10 P M telegram of the 8th May from Darjeeling (*Ex 222, Vol 1, p 300*), which for the first time gave the news that the second Kumar was "seriously ill" and passing "frequent watery motions with blood", Bara Kumar and other members of the family at Jaidebpur were very much upset, and it was decided to send up Chota Kumar to Darjeeling, but as there was no train available on that day, it was arranged that he should leave by the earliest train the next morning. Meanwhile, Bara Kumar sent a telegram to Darjeeling, being the 4-45 P M message of the 8th May (*Ex 260, Vol 1, p 299*), saying "Wire condition very often Wire immediately present condition". To this telegram, it may be recalled in passing, there was no reply, and no explanation is forthcoming from the defendants why there was none, if the second Kumar actually survived till midnight. Chota Kumar actually set out for Darjeeling at about 8 A M the next morning. But as he was on his way to the station to catch the train and got very near the station premises, a telegram was handed over to him by a peon announcing that his brother was dead. It is common case between the parties that this was the time and place the telegram of death was delivered, whatever the hour it might have been despatched from Darjeeling. On receipt of the news Chota Kumar burst into tears, and came back home weeping. Billoo's evidence is that he saw the telegram, but remembers only one word in it—"expired". His recollection is that it stated that the second Kumar had died at dusk (*Vol 10, p 326, ll 27-31 and p 327, ll 6-8*). In cross-examination he was asked

"Q—Do you remember that the telegram announcing death mentioned evening as the time of death?"

And he answered

"A—If I remembered that, I could say so at once, but that is the impression I have" (*ibid, p 362, ll 1-4*)

Sagar, who came to depose later, says that he was with Chota Kumar at the time, and he read the telegram which was as follows—

"Mejo (or Mejo Kumar) expired this evening" (*Vol 11, p 182, ll 4-6*). All that was put to him in cross-examination regarding the contents of the telegram was this

"Q—I put it to you that the telegram which came said that the second Kumar died at midnight"

—not, be it noted, the phraseology which defendants' witness Phani Blinsau Banerji, D W 92, afterwards came to give as the "exact" wording of the telegram

"Heart tends to write Kumar expired last midnight" (*Vol 14, p 130, ll 20-22*)

Sagar answered

"A—It said, 'expired this evening' I saw it with my own eyes"

Asked if he noticed the hour of despatch on the telegram, he said he was not

in a condition to do so. No specific hour of despatch, be it also noted, was put to him (*Vol 11, p 225, ll 36-40*)

The learned judge has accepted this evidence, and I see no reason to disagree with him. The only comment which Mr Chaudhuri makes is that none of the plaintiff's previous witnesses had stated that Sagar was to have gone with Chota Kumar to Darjeeling or that he was at the station with Chota Kumar. Sagar says in cross-examination that everyone in the Raj family knew that he was going to Darjeeling (*Vol 11, p 225, ll 31-32*), but Mr Chaudhuri points out that this is not supported by other witnesses of the plaintiff. I do not think that there is any substance in this criticism. P W 15, Keshab Chandra Mukherji, one of the witnesses referred to by Mr Chaudhuri in this connection, merely states that Chota Kumar and he and Digendra Banerjee started for Darjeeling and that on their way to the Jaidebpur station they heard the news of the second Kumar's death. It was then 7 or 8 A M (*Vol 4, p 200, ll 2-4*). An earlier witness, P W 5, Suresh Chandra Mukherji, also says "The youngest Kumar and Digendra set out to go to Darjeeling, but they heard the news of death and came back" (*Vol 4, p 57, ll 9-10*). Reference is also made to the evidence of Jyotirmoyee Devi, who, however, says no more than this:

"The next day the Chota Kumar set out to Calcutta (*sic*) by the 8 o'clock train. Then a man came running saying, 'Chota Kumar is coming back'. After Chota Kumar returned I heard the second Kumar was dead" (*Vol 8, p 289, ll 3-6*)

Billoo's evidence, again, is referred to, but all that he says is

"There was no time for the Chota Kumar to start that day. Next day, Chota Kumar, Keshab Mukherji and Digen Banerjee set out for the station. They returned from the way to the station—from the station as they got a telegram saying that the second Kumar was dead" (*Vol 10, p 326, ll 24-27*)

It will be seen that all these statements were made by the witnesses in examination-in-chief, and none of them were cross-examined as to whether they purported to give an exhaustive list of the persons who had accompanied Chota Kumar to the station. Nor was there any cross-examination of Sagar himself to suggest that he was not one of Chota Kumar's party who were present at the station or were to have gone with him to Darjeeling, much less was his attention directed to the evidence of the other witnesses, which it is now for the first time suggested tends to exclude Sagar. I have no hesitation, therefore, in rejecting Mr Chaudhuri's criticism of Sagar's evidence as a pure after-thought.

PLAINTIFF'S CASE REGARDING DEATH TELEGRAM

It is significant that the story told by the plaintiff's witnesses as to the circumstances in which the telegram of death was received is confirmed in its broad outline by the defendants themselves, even such a thoroughly unreliable witness of theirs as D W 92, Pham Banerjee, is unable to deny it. It is also a point worthy of special note that though it would have suited the plaintiff better to make out that the telegram had been delivered at the Rajbari in the course of the night, he did not attempt to make such a case, but on the other hand came to court with a story which he knew would to all appearances be more consistent with the defendants' case. The surviving

members of the family who were at Jaidebpur Rajbari on the night of the 8th May have nearly all deposed on the side of the plaintiff, and if the plaintiff was minded to make a false case, nothing would have been easier for him than to get these witnesses to say that the telegram had been received during the night, and the defendants in that case would obviously have found it difficult to contradict such evidence except by the production of the telegram itself. The fact that the plaintiff has not, however, adopted such an easy course only shows to my mind his anxiety not to improve his case at the expense of truth. It is indeed a feature of the plaintiff's case—such a singular contrast in this respect to that of the defendants—that the evidence was allowed to shape the case, and not the case the evidence.

That this is so is fully borne out by the evidence of another witness Niranjan Ray, P W 982, already referred to, who was called by the plaintiff to prove the Darjeeling telegrams, but who when asked about the telegram of death would not say a word more than he could recollect. He was a telegraph signaller at the Jaidebpur Railway Telegraph office in May, 1909, where his hours of duty were from 6 A.M. to 6 P.M., after which the Assistant Station Master would be in charge. "I have no recollection", he says, "but perhaps a telegram announcing death of Kumar came that night. I could say definitely if I am shown a copy of that." Speaking from such recollection as he has, he adds that there was a *golmal* at the station that the Kumar was dead, and explains that he would be generally at the station when off duty, as his quarters were quite close (*Vol 11, p 256, ll 9-14*). In cross-examination he states that the *golmal* took place at about 9-30 or 10 P.M. and that it was a *golmal* among the railway staff (*ibid, p 257, ll 25-26*). The learned judge has accepted this evidence, but as he points out with characteristic fairness, it falls short of establishing that the telegram might not have been despatched from Darjeeling after midnight (*Vol 18, p 359, ll 30-31*).

If, however, the witness's recollection can be trusted, it will undoubtedly show that a telegram containing the news of the second Kumar's death must have been received at the railway station at about 9-30 or 10 P.M. on the 8th May. It will be seen that the witness was not cross-examined as to why the message could not be sent out for delivery that night. All that he was asked was if he had sent information to the Rajbari.

"Q—Did you send for information at the Rajbari (*sic*)?"

A—"No" (*ibid, p 257, ll 25-29*)

Being off duty at the time, he would not of course be expected to send out the message. Billoo and Sagar had, however, already deposed to the telegram having been delivered to Chota Kumar the next morning, when this witness on his own evidence would be on duty, and yet no question was put to him in cross-examination if he had actually arranged for delivery of the telegram. In re-examination, on the other hand, he was asked

"Q—If a message had come, can you (*sic*) and if it was not sent to the Palace, can you explain why?"

And his answer was

"A—Possibly, not to upset the Rajbari" (*ibid, p 258, ll 1-3*)

This has given Mr Chaudhuri a ground for attacking the learned judge as well as the witness. The judge's reason, he says, in accordance with the suggestion made by Niranjan, that the telegram might have been kept back so as not to upset the family, is "impossible" and "ridiculous", and has been

resorted to without the slightest foundation in the evidence in order to explain away the delivery of the telegram in the morning. But whether this be so or not, if Mr Chaudhuri only cared to refer to the Indian Telegraph Guide, which he knows is a quarterly publication issued under the authority of the Director-General of Telegraphs, he would have seen that the belated delivery of the telegram would not after all be such an inexplicable event as he seemed to think. It is perhaps not a violent assumption to make that the news of death would be conveyed in an "ordinary" and not an "Express" telegram, and in that case, under the departmental rules, the telegram would not be delivered in the course of the night. The Indian Telegraph Guide for the quarter commencing April, 1909 sets out the rules thus (*section II, p 19*)

"Rule 59 Express telegrams have precedence over Ordinary telegrams in transmission and are delivered by messengers at any time during the day or night

Rule 60 Ordinary telegrams are transmitted in their turn after Express telegrams, and *delivery is effected by messengers between 6 hours and 21 hours (i.e., between 6 A.M. and 9 P.M.)* These hours are subject to modification to suit local requirements"

In my opinion, the plaintiff has proved as much of his case regarding the telegram of death as it was possible for him to prove, and I hold in entire agreement with the learned judge that without attempting to place his evidence higher than the facts would justify, he has succeeded in showing that the telegram mentioned "evening" as the time of death, as deposed to by Sagar. I may add that I see no improbability in the suggestion that the telegram was received at Jaidebpur at about 9-30 or 10 P.M. in the evening, but was not delivered until the next morning.

This conclusion is only strengthened by reason of the unsatisfactory character of the evidence led by the defendants on the subject, though, as already stated, they were the party from whom definite and consistent evidence should have been forthcoming. This evidence may be now briefly considered.

DEFENDANTS' WANT OF A DEFINITE CASE

Evidently the defendants had no case to make through their witnesses regarding the transmission of the telegram of death from Darjeeling—neither as to the person who sent it nor as to the hour when it was sent. These facts could be proved only by some members of the second Kumar's party who were at Darjeeling at the time. Several of these persons have deposed on behalf of the defendants, such as Bibhabati Devi herself, Satyendra, Dr Ashutosh Das Gupta, Birendra Chandra Banerjee, Anthony Morel and Bepin Khansama, but I think I am not mistaken in saying that none of them have said a word in examination-in-chief regarding the despatch of a telegram announcing the death of the second Kumar. The first of these witnesses to give evidence was Anthony Morel who was examined on commission (*Vol. 2, pp 367-431*). He was asked in cross-examination if any telegram had been sent from Darjeeling to Jaidebpur on the night of the 8th May, and he seemed to remember that it had been done (*ibid, p 422, ll 7-9*). The next question put to him was—"At what time?"

But significantly enough, this was objected to. He answered, he did not exactly remember. The question was then repeated in a more specific form.

"Q—Was it before or after 12 o'clock (night)?"

This again was objected to.

"A—I do not exactly remember at what time. I have not kept in mind, even by guess. It was a matter which happened so long ago."

He was more definite in his reply to the next question.

"Q—Was any telegram conveying the news of the Kumar's death sent from Darjeeling?"

A—It was sent.

Q—On what date was it sent?

A—I do not remember whether it was on that very night or on the morning of the next day. That telegram was sent to the eldest Kumar.

Q—Who sent the telegram?

A—Probably Satya Babu."

It will be seen that up to this stage the defendants were not prepared to say whether the telegram had been despatched during the night of the 8th May or the following morning.

EVIDENCE OF BIRENDRA BANERJEE

The next Darjeeling witness was Bibhabati Devi herself (*Vol 12, pp 196-314*), but neither in her examination-in-chief nor in her cross-examination was there any reference to the telegram of death. Bepin Khansama, D W 140, came next (*Vol 14, pp 487-505*) he too had nothing to say about it. Then came Birendra (D W 290) who also was not asked about any such telegram in examination-in-chief, but he found himself in a difficulty in cross-examination, as he was handicapped by a previous statement of his in the Sripur case. Deposing in that case in 1922, he had said quite plainly

"After death, on the night of death, Dr Calvert sent a telegram to Jaidebpur reporting death of second Kumar. Probably it was sent to Bara Kumar and Chota Kumar received the same. No reply was sent to the telegram of Dr Calvert" (*Ex 350, Vol III, p 14, ll 32-35*).

He is a witness who has given himself a certificate that he "never tells falsehoods" (*Vol 15, p 325, l 3*), but one has only to read his present evidence side by side with his previous deposition to see how far this is a correct picture. The way in which he struggles to get out of his former statement regarding Dr Calvert having sent the telegram of death is quite characteristic.

"I do not know", he now says, "whether Dr Calvert sent a telegram to Jaidebpur that night. I do not know whether any telegram was sent that night. Dr Calvert was requested to send a telegram in my presence, and because of this request I believe a telegram was sent. This request was made after death. It was made to Dr Calvert in the Doctor's sitting room upstairs. Dr Nibaran, Satya, Ashu Babu and Mukunda Babu were present."

"To Court. This was between 12 P M and 1 A M in the night" (*Vol 15, p 347, ll 22-28*).

Confronted with his positive statement in the Sripur case, he tried to explain that he had said this because of the request made to Dr Calvert. He even went the length of suggesting that Calvert had been merely asked to send the news of death, and not a telegram (*ibid*, p 347, ll 29-32), but was constrained to admit that the statement recorded showed that he had himself introduced the word 'telegram' (*ibid*, p 348, ll 10-13). He had no explanation to offer why Calvert should have been asked to send the telegram instead of any of the Kumar's party sending it. He pretended that he did not know till then whether Calvert had actually sent the telegram.

Comment on this evidence is perhaps useless. It may be that Birendra made a lying statement in the Sripur case on purpose. If he mentioned Calvert as the person who had sent the telegram, Calvert being then away in England, there would of course be little chance of his statement being contradicted. On the other hand, if he had given the name of Satyendra, it might have involved the risk of bringing him into the box, or of inviting adverse comment in case he did not come forward. Be that as it may, the only conclusion one can draw is that in so far as the defendants are constrained to make some kind of a definite case regarding the sending of this telegram, it is on their own showing a false case. None of the other witnesses of the defendants support Birendra in this behalf.

OTHER EVIDENCE

Coming next to Dr Ashutosh Das Gupta, D W 365 (*Vol 16*, pp 240-246), there is again the same absence of reference in his evidence to the telegram of death, although he mentions the telegram of illness. Finally, there is Satyendra who has an entry in his own diary under date the 8th May "Message to Uttarpur and J'dpore" (Jaidehpore) (*Ex 399 (1)*, *Vol I*, p 306, l 13). One should have expected him at any rate to throw some light on the question, but not only is he wholly reticent about it in his examination-in-chief, but when confronted in cross-examination with what appears in the diary, all that he is able to say is, "I wrote it—it means telegraphic message", but he cannot say who actually wrote the messages, much less can he say when the messages were sent (*Vol 16*, p 500, ll 31-32). It does seem remarkable that Satyendra's memory, so surprisingly keen and active in regard to other matters in connection with the Darjeeling incidents, should be a perfect blank in regard to this.

Mr Chaudhuri suggested that if the defendants wanted to make a false case as to the person by whom and the time when the telegram was sent from Darjeeling, they might easily have given a name and an hour to fit in with their story. He forgets, however, that some of his witnesses did not hesitate to do so. Birendra, for instance, did name Calvert as the sender, and indicate night as the time when the message was sent. Another of their important witnesses, Phani Bhusan Banerjee, D W 92, who pretended to give the "exact words" of the telegram, was quite positive in stating—and be it noted, this he did in examination-in-chief—that this was a telegram from C J Cabral (*Vol 14*, p 130, ll 18-22). He is supposed to have gone to the station with Chota Kumar on the morning of the 9th May and read the telegram there. In cross-examination his memory seems to have further brightened up, and he remembered not only that the telegram was marked "urgent", but that "the despatching hour in the telegram was morning" (*ibid*, p 149, l 32 and p 150, ll 10-11). Asked if he had read

the hour of despatch in the telegram itself, he was a little less positive in his answer

"A—It may be that, or it may be that as the telegram was coming then, and death had occurred 'yesterday midnight' I presumed the telegram had been despatched in the morning" (*ibid*, p 150, ll 12-51)

Anthony Morel's evidence has been already referred to "probably Satya Babu" sent the telegram, though the witness could not say whether it was sent on the night the Kumar died, or the next morning (*Vol 2, p 422, ll 19-22*) With all this evidence staring them in the face, it seems to me idle for the defendants to pretend that if other witnesses on their side did not commit themselves to any specific case regarding the sending of the telegram, they were held back from doing so by any excess of anxiety on their part to avoid making a false case So far as Satyendra is concerned, I do not believe for a moment that his reticence on the subject was due to mere lapse of memory

SATYENDRA'S DIARY ON THIS TELEGRAM

According to Satyendra's diary, a telegram of death was sent to Uttarpura at the same time as the one to Jaidebpur This telegram could not of course have been suppressed by the Bara Rani, but the fact remains that this has not been produced by the defendants either There is, however, on the record a telegram from Uttarpura sent through the Bally Telegraph Office to Bara Kumar on the 9th May, and admittedly despatched at 14-5 hours (*Ex 226 (a), Vol I, p 305*) It was a message from Ramnarain Mukherjee, mother's brother of Bibhabati Devi, reading as follows

"Sister earnest requests that Biva should come here directly Kindly agree and arrange accordingly "

Mr Chaudhuri suggested that this was a reply to the telegram of death, and argued from it that the latter must, therefore, have been sent in the early morning of the 9th May, which, according to him, would exclude death in the evening and establish death at midnight Apart from the fact that there is no foundation in the evidence for Mr Chaudhuri's suggestion, such an assumption seems to be excluded by the wording of Ramnarain's telegram itself, which in fact appears to pre-suppose an earlier message of condolence as a reply to the telegram of death In any case, though a telegram in the evening would exclude death at midnight, it is not at all clear how a telegram sent early next morning would necessarily exclude death at dusk

CASE MADE BY COUNSEL

Without committing himself to a specific hour, Mr Chaudhuri made the definite case before us that the telegram of death must have been sent from Darjeeling in the early morning of the 9th May It is necessary, therefore, to consider how far this is supported by the defendants' evidence or is consistent with probabilities As we have seen, according to the plaintiff's case, the telegram was a Railway message, transmitted from the Darjeeling Railway Telegraph Office to the Railway Telegraph Office at Jaidebpur (*see the evidence of Nnanjan Ray, Vol 11, p 256*), but Mr Chaudhuri maintained that it was a Government Telegraph message, this being in accordance with the evidence of his witness Phani Bhusan Banerjee, DW 92, who stated that the telegram arrived from the Post

Office and was delivered through a postal peon (*Vol 14, p 150, l 27 and p 130, ll 17-18*) Admittedly, the telegram was delivered to Chota Kumar near the Jaidebpur Railway Station on the morning of the 9th May as he was on his way to catch the train, and if defendants' witness David Manuk is to be believed, this was within half an hour of the starting of the train (*Vol 3, p 328, ll 12-13*) With the consent of the parties we obtained from the Eastern Bengal Railway authorities a copy of the Time Table for May, 1909, as we also got from the Telegraph authorities a copy of the Indian Telegraph Guide of the time, which has been already referred to The Time Table shows that the morning train was due to leave Jaidebpur at 8-32 hours It is reasonable, therefore, to suppose that the telegram was delivered to Chota Kumar at about 8 A.M. in the morning

Clearly, on the defendants' case, the telegram could not have been sent as an "Ordinary" message The 9th May was a Sunday, and under Rule 61-A of the Indian Telegraph Guide, an Ordinary telegram would not be accepted on Sunday, the rule running as follows —

"Ordinary telegrams are not accepted on Sundays and the four principal holidays, Christmas Day, New Year's Day, Good Friday and the King's Birthday"

Secondly, under Rule 2, such a telegram would not be accepted except during working hours Rule 2 lays down—

"Subject to the provisions of Rules 2-A, 61-A and 128-A, telegrams are accepted at all Government Telegraph Offices during the hours noted against them in the List of Offices published in Section VI"

and according to the Telegraph Guide, the working hours of the Darjeeling Government Telegraph Office in May, 1909, were from 7 to 21 hours on ordinary days, and from 8 to 10 and 16 to 18 hours on Sundays and holidays

The question, therefore, arises as to whether the telegram could have come through "Express", as is in fact the evidence of D.W. 92, Phani Bhushan Banerjee, already quoted Rule 2-A, which, as noted above, is an exception to Rule 2, lays down that an Express telegram will be accepted during the hours when an office is closed, if the terminal office is open or its attention can be gained, on the payment of extra fees The Telegraph Guide shows that the Government Telegraph Office at Jaidebpur, which was a combined Post and Telegraph Office, was open only from 7 to 9 and 12 to 17 hours on ordinary days, and from 8 to 9 and 16 to 17 hours on Sundays and holidays, though the Railway Telegraph Office was open at all hours during all days of the week, including Sundays and holidays If it be a fact that the telegram was delivered at 8 A.M., it must have been presented at Darjeeling before that hour, but the rules make it clear that even an Express telegram for Jaidebpur would not be accepted at Darjeeling on Sunday before 8 A.M., unless it was possible to "gain" the attention of the Jaidebpur office There is, however, no evidence on the point forthcoming from the defendants, and I do not think this is a matter in which the court will be justified in drawing a presumption in their favour under s 114 of the Indian Evidence Act Taking all the facts and circumstances into consideration, it seems to me that the probabilities are clearly against the case made by learned counsel on their behalf

It remains to point out for what it is worth that the entry in Satyendra's diary relating to this telegram is under date the 8th May, and not the 9th If this is a correct record,—and Satyendra himself does not suggest it is otherwise,—the telegram could not have been despatched on the morning of the 9th, as Mr Chaudhuri would now have it On the other hand, if

the order in which the entries of the 8th May are made is any indication of the sequence of events recorded therein, the telegram must have been despatched after the doctors "melted away" and Satyendra sent for his *Sejomama* Suryanarain, and before he sent a messenger to the Sanitarium to get men to remove the corpse for funeral, and on the defendants' evidence already referred to, this must have been before 1 A.M.

One of Mr Chaudhuri's contentions was that if the telegram of death had mentioned "evening" as the hour of death, it would have excited Bara Kumar's suspicion as being inconsistent with the hour "11-45 P.M." mentioned in Calvert's certificate of death, and he refers in this connection to the evidence of Jyotirmoyee Devi who says that about a month and a half after the second Kumar's *sraddh*, Bara Kumar received an anonymous letter, in consequence of which he was about to go out in search of the second Kumar, but was dissuaded from doing so by Satyendra showing him Calvert's certificate (*Vol 8, p 289, ll 20-26 and p 322, ll 9-11*) The short answer is that there is nothing in the evidence to show that the exact time of death was a point of any importance at this stage, and the mention of "evening" in the telegram was no more likely to have given rise to any suspicion of inconsistency with the certificate than the statement in the certificate itself that "the attack became acute on the morning of the 8th and he (Kumar) died the same evening" (*Ex Z (111), Vol 1, p 178, ll 25-26*) Bara Kumar, again, it may be added, might not have noticed the hour of despatch on the telegram when it was received, or remembered it at the time he was shown Calvert's certificate of death

Another point on which Mr Chaudhuri laid some stress was that at quite an early stage in the case, long before the trial commenced, one of the defendants' witnesses examined on commission, David Manuk, speaking about the contents of the telegram, definitely mentioned "about midnight" as the hour of death (*Vol 3, p 307, ll 36-37*), but that there was no cross-examination of the witness that it was not "midnight" but "evening" It was suggested that "evening" was an after-thought on the part of the plaintiff It will be seen, however, that Manuk was pointedly asked in cross-examination about the hour of despatch of the telegram, and he answered, "I cannot say" (*ibid, p 326, ll 16-18*) Earlier, Anthony Morel, another of defendants' commission witnesses, was specifically questioned if the telegram had been sent from Darjeeling before midnight (*Vol 2, p 422, l 12*) With all respect to learned counsel, I feel bound to say, therefore, that the point raised by him does not appear to me to be of any significance whatever

TRIAL JUDGE'S FINDING AFFIRMED

To my mind, on the materials on the record, there seems to be no escape from the conclusion reached by the learned trial judge regarding the telegram of death (*Vol 18, p 359, ll 29-36*)

In my opinion, I may repeat, there is clearly no foundation for suggesting—none, at any rate, for such a suggestion in the sense in which Mr Chaudhuri made it,—that on the question of the hour of death or supposed death, the learned judge rests his conclusion not on any direct evidence, but on certain circumstances, "not one of them, but all taken together" (*Vol 18, p 355, ll 20 et seq*) The direct evidence of the defendants on the point, as already indicated, consists primarily of the statements of persons who were said to have been present at "Step Aside" at the time As regards

others, like Rajendra Nath Sett and Tinkari Mukherjee from the Lewis Jubilee Sanitarium, or Shyamadas Banerjee and Durga Charan Pal from the Old Cutchery Building, their evidence as to the hour of death is virtually hearsay, and has no independent value of its own. All that they say is that they received a summons from "Step Aside" at about 1 or 1-30 A.M. that night to come over there for the cremation. Even if this evidence be accepted as true, it can establish no more than that death had taken place at some time before that hour. Rajendra Nath Sett does not even purport to say that on going to "Step Aside" he heard that the Kumar had died at about midnight. He speaks to the contents of a "shp" which he received from Satyendra, but this does not give the time of death, and merely states, "Dear Mr Sett, Kumar is no more, please come with Brahmmins for the last rites" (Vol 1, p 301, ll 6-8). It is needless to say the shp has not been produced. Tinkari Mukherjee also says no more than that a man came to call them for the funeral after the second Kumar's death (Vol 1, p 434, l 5 and p 451, ll 20-26). Shyamadas Banerjee, who too is said to have been informed of the Kumar's death by a shp from Satyendra, no doubt says that on his way to "Step Aside" the peon who had brought the shp told him that the Kumar had died half an hour or an hour before (Vol 1, p 256, ll 11-12 and ll 16-22, and p 269, ll 8-10), but neither has the shp been produced, nor the peon examined. Durga Charan Pal in his turn merely speaks to having received the news of death after midnight and says nothing as to when the event had occurred (Vol 13, p 146, ll 25-26).

EVIDENCE OF P W RAM SING SUBHA

I may now pass on to consider the direct evidence regarding the hour of death on behalf of the plaintiff which, as already stated, comes from Ram Sing Subha, P.W. 987, as well as from two other witnesses, Chandra Singh, P.W. 968, and Mahammad Ashraf Alam, P.W. 980, to whom, however, the learned judge has not referred in this connection. As the plaintiff relies strongly on the evidence of Ram Sing Subha, not only on this question but also in connection with other points, it may be useful to deal with it at some length here.

Ram Sing Subha was an agent of Mr Wernicke, the landlord of "Step Aside", through whom, it is admitted, Satyendra and Mukunda Guin had engaged the house for the second Kumar. He then lived in the outhouses of Mall Villa No 3, which was quite close to "Step Aside" and on the same road (Rangit Road), going down north towards Lebong, the distance being about 150 feet by a steep route, and 400 to 500 feet by the main road, if one took a round-about way. During the Kumar's stay at "Step Aside" he would be visiting him almost daily. After about 10 or 12 days, however, he did not meet him any further and was informed by "Sala Babu" (brother-in-law), that being the name by which Satyendra was familiarly known in the house, that the Kumar was ill of dysentery. Two or three days later, on a Saturday afternoon, he remembers he returned from the Lebong races at about 4-30 P.M. and took his meal. About two hours later he heard cries of lamentation, which appeared to him to be women's cries, proceeding from "Step Aside", and he went over to see what it was about. It was then 7 or 7-30 P.M. He found the servants downstairs talking, and gathered that the Kumar had died. He went upstairs by the sloping hill-path and saw the Kumar's body lying on a mattress spread on the floor in a small room, being room No 1 at the southernmost end of the house, covered from head to foot with a white cloth. He noticed several persons

sitting there quietly, among whom he mentions Dr B B Sarkar, and left after a few minutes, without having exchanged any word with them. He came downstairs by the wooden staircase, and on his way, as he passed along the glazed verandah from south to north, he could see through the doors the second Rani lying on an iron cot in room No 3, crying aloud "The room in which the Rani was", he says, "I found locked up from outside. I saw the lock." He retired for the night feeling very sad and was waked up from sleep by a Nepali servant who reported that there was some *golmal*. He did not, however, leave his bed. Early next morning he went over to "Step Aside" again, when he was asked by "Sala Babu" to procure a *charpoy* and assist in sending funeral requisites to the "*sasan*", which he did from the bazar. Returning to "Step Aside" at about 8-30 A.M., he noticed a dead body placed on the charpoy in the outer compound of the house, fully covered up with a shawl. He joined the funeral procession, went to the new cremation ground, and saw the dead body laid on the pyre, covered up as before, and burnt. At the time the body was lifted from the *charpoy* to the pyre, the cloth slipped off a little, and he could catch a glimpse of two or three small marks on the left side of the body near the ribs. He adds that nobody could see the face of the dead body during cremation.

DEFENDANTS' CRITICISMS

There can be no question that if one believes this witness, as the learned judge has done, it fully establishes the plaintiff's case regarding death at dusk and a morning cremation with a body of which the face was not exposed. Speaking for myself, I see no inherent marks of falsehood in this evidence, but as was to be expected, it has come in for severe castigation at the hands of Mr Chaudhuri, and it is necessary, therefore, to consider his grounds of attack.

PLAINTIFF'S TADBIRKAR

The first and foremost reason why it is said this witness should be discredited is that he was trying to secure false evidence of a substituted dead body in the Defamation Case at the instance of the plaintiff and his party. He had deposed in this case himself, and had come to Dacca for the purpose on March 21, 1923, and also made an affidavit there about four months or so earlier. Questioned if he afterwards made any *tadbir* or any efforts to bring witnesses in that case, he denied having done so, or having obtained or sent any statements of any witnesses (Vol 11, p 70, ll 20-37). He was, however, confronted with certain letters of his, two of these, *Exs Z(52) and Z(53)*, (Vol III, p 41 and p 42) dated March 28 and March 29, 1923, respectively, addressed to one Adong Babu, showed that on his way back to Darjeeling from Dacca, he stopped at Kurseong and tried to see him at Dow Hill, but as he did not meet him there, he was writing to let him know the date of the Defamation Case and to ask that he should attend at Dacca on or before the 7th April, 1923, where his expenses would be paid. The witness himself, it was mentioned, would be at Dacca with Latik Bhotiyani of Dow Hill and Jomi Nurse. Another letter to one Jeebay (wrongly printed as Jechay Baboo) dated April 16, 1923, (*Ex Z(55)*, *ibid*, p 44) showed that he had got a statement from this person some time ago. Latik Bhotiyani, it is said, was the aunt of the "stout and fair complexioned" Lepcha, named Pengumche, referred to in the question which was put to Lindsay in cross-examination, suggesting that this was the man whose dead body was found covered up at "Step Aside" on the morning of May 9 (Vol 2, p 178, ll 29-32).

I am not at all sure that any of the facts elicited from the witness in cross-examination tend to show that his evidence must necessarily be false. It is true that he first denied having made any *tadbir* in the Defamation Case, but this may have been due to mere lapse of memory, for, as soon as his letters were shown to him, he promptly admitted that they were his and that what he had said therein must have been correct. There is nothing in these letters to lend support to Mr Chaudhuri's suggestion of any improper attempt on his part to procure the evidence of Latik Bhotiyani, much less to show that he made such attempt at the instance of the plaintiff or anyone connected with his party. All that appears is that he was proposing to go to Dacca with Latik Bhotiyani. His positive statement is that he did not actually bring this witness to Dacca; he heard that she had deposed in the case, but did not know (*Vol 11, p 72, l 9 and l 13*). He also states that what he did in the Defamation Case, he did for Purna Chandra Ghose, the accused therein (*ibid, p 71, l 13*). He admits that when he came to Dacca to swear the affidavit, he saw Ram Satyabhama, but he did not see her when he came to depose which, according to his evidence as already stated, was on March 21, 1923, about four months or so later. This would be quite consistent with the fact as we know it that Rani Satyabhama died on December 15, 1922.

Ram Sing Subha further said in his evidence that he had been approached by the defendants in connection with the present case about three months before he came to depose, and produced a letter purporting to be from Bibhabati Devi, which is said to have been handed over to him by a Darjeeling pleader of the name of S N Gupta (*Vol 11, p 69, l 28—p 70, l 4*). As, however, on the letter (*Ex 205, Vol III, p 318*) being put to Bibhabati, she denied the writing and signature, (*Vol 12, p 217, l 15-19*), it cannot be said to have been proved, and no notice can, therefore, be taken of it. In cross-examination the witness denied the statements imputed to him in the letter (*Vol 11, p 81, l 23-29*).

WRONG DESCRIPTION OF SASAN

It is next urged by Mr Chaudhuri against this witness that he gave a false description of the cremation ground, showing that he could never have attended the funeral as stated by him. The 'false description' is supposed to consist (i) in his denial of the existence of a *pucca* pyre on the new *sasan* at the time (*Vol 11, p 67, l 5-6*), (ii) in his mention of the slaughter-house to the left of the old Sudhir Kumari Road, as one descended along this path towards the new *sasan* (*ibid, p 67, l 14-15*), and (iii) in his statement that in 1909 Morganstein had only his vegetable garden near the cremation ground, and not his house "Rosary" (*ibid, p 69, l 23-25*).

As for the *pucca* pyre, it appears from the cross-examination itself that in the Defamation Case Ram Sing Subha had stated that "the place where dead bodies are generally burnt looks like a *pucca* place. The place where the dead body was burnt was five or six cubits off this *pucca* place" (*ibid, p 78, l 32-34*), and there would be no point whatever in his denying it now, if his recollection was not faulty. Mr Chaudhuri has only to make a study in contrast by referring to what his own important witness R N Banerjee said, and said with an air of positive assurance which Ram Sing Subha could not approach, about there having been a shed in the new

cremation ground in 1905 or 1906—exactly the same as he saw it in 1909 when he took the dead body of the second Kumar there

"Q—Do you remember if there was or was not any shed in the cremation ground?

A—There was a shed there which I saw in 1905 or 1906 and which I observed when I went to cremate the remains of Rai Bahadur Das, a medical practitioner (According to D W 411, Vol 17, p 315, ll 24-25, Rai Bahadur Das died about 1905 or 1906)

Q—Was that shed in existence in the year 1909 when you went to cremate the dead body of the second Kumar?

A—It was exactly the same as when I first saw it in 1905 or 1906

Q—Is the present cremation ground the same as where the body of the second Kumar was taken for cremation?

A—The grounds are the same, the place is the same, but it has been improved beyond recognition" (Vol 3, p 108, ll 11-22)

Secondly, as for the slaughter-house mentioned by Ram Sing Subha, it is not at all clear that he was not identifying the "small foot-path" from the old to the new cremation ground not only by its name Sudhur Kumar Road, but also by reference to the present slaughter-house which would undoubtedly be on the left side, going downhill. The witness, it may be added, was not at all cross-examined regarding the slaughter-house. Lastly, as for the "Rosary", he states in cross-examination that he does not remember if he saw the "Rosary" in 1909 (Vol 11, p 81, l 10). The evidence of Morganstein's son, D W 398, (Vol 17, p 127, ll 17-20) shows that the house which was completed in 1907 was first known as "Emil's Cot", and then called "Rosary" since the Great War

In any case, even if the witness was wrong in his description of the *sason* in certain particulars, these were much too trivial mistakes, and one should not be justified in making too much of them

DENIAL OF ADMITTED INCIDENTS

Mr Chaudhuri's next point of attack is that Ram Sing Subha denies two important incidents which are said to have taken place at the cremation ground, namely, the uncontrollable demonstrations of grief on the part of Brenda Chandra Banerjee and Sarif Khan, the former rolling on the ground and the latter trying to throw himself on the funeral pyre—incidents which, it is pointed out, the learned judge himself says have been admitted on behalf of the plaintiff (Vol 18, p 379, ll 21-24). This is what the witness says

"I did not see anybody trying to fling himself on the pyre. I did not see anybody catch hold of anybody trying to do so. If such a thing had taken place, I would have seen it. I do not remember anybody starting to cry there. I saw nobody rolling on the ground.

Q—It is wholly false?

A—Yes" (Vol 11, p 78, ll 19-25)

It is true that Basanta Kumar Mukherjee, P W 823, refers to these incidents in his evidence (Vol 9, p 385, ll 12-22), as he also did in his former

statement to Mr N K Roy (*Vol II, p 234, ll 14-17*) I am not, however, prepared to hold, merely because Ram Sing Subha did not notice these happenings or remember having noticed them, he must be giving false evidence. Be it noted that the suggestion was not put to the witness by the defence that he had not gone to the cremation ground. Many of defendants' witnesses also do not mention any of these incidents, such, for instance, as R N Banerjee referred to above.

"MEDDLESOME" AND "OFFICIOUS" CONDUCT

Mr Chaudhuri next comments on the conduct of Ram Sing Subha after he came to "Step Aside" on the evening of the 8th May, which, taking his cue probably from a remark which fell from one of the members of the Bench, he suggested was that of a "meddlesome", "impudent" and "officious" person. This man, said Mr Chaudhuri, goes upstairs, wanders through the rooms, speaks to nobody, he peeps into a room and sees a dead body lying there and leaves the house, and then goes to sleep because he is feeling sad. All I can say is that in the first place, this is a caricature of the witness's evidence, and secondly, that it betrays a lack of understanding of things as they would happen in this country which might perhaps be excusable in my learned colleague, but not certainly on the part of Mr Chaudhuri. In fairness to my learned brother, I must say, however, that he himself suggested to Mr Chaudhuri later on that what had struck him before as an "outrageous proceeding" on the part of Ram Sing Subha was not really so. After all, what is he supposed to have done? Here is a man who has been going to the Kumar every day, a few days later, he hears about his illness. All on a sudden one evening he hears cries of lamentation from the house. He forthwith proceeds there and is told the Kumar is dead. He quietly walks upstairs, and sees a number of persons sitting there in silence. None of them speak to him and he does not speak to any one either. After a while, he leaves the place, and as he passes along the verandah, his attention is naturally attracted by the Ram's weeping inside a room. The doors of the room are shut, but through the glass panes he sees the Ram lying on a cot. There is no question of any impertinent peeping into the room. He returns home, and retires to bed, feeling depressed. Where is anything "preposterous" in this? There is no attempt on his part to disturb anybody. He neither wanders all over the place, nor exhibits any prurient curiosity. Nor, it is true, does he officiously offer his services. The reason why he does not leave his bed and go over to "Step Aside" again during the night when he hears about the *goimal*, may be that he is not told that he is wanted there at that hour. He may well have thought and according to Mr Chaudhuri he would be quite justified in so thinking, that the cremation could not be taking place before dawn. To my mind, I have no hesitation in saying, the conduct of Ram Sing Subha seems to be perfectly reasonable and natural, and his evidence bears on the face of it the impress of truth.

RANI "LOCKED UP"

Mr Chaudhuri made a good deal of Ram Singh Subha's statement that he found the room in which the Rani was, "locked up from outside". What he obviously meant was that the door was shut, as he explains in cross-examination.

"In the room marked "A" the Ram lay locked up as I said The door-lock was locked There was no padlock I did not see if the key had been turned, but the door was shut" (Vol 11, p 76, ll 25-27)

Mr Chandhuri finds fault with the learned judge for suggesting that the defendants gave evidence to show that the dead body lay in room No 2, only to discredit Ram Sing Subha, who says that he saw the body in room No 1 (Vol 18, p 363, ll 5-9), and he points out that R N Banerjee had stated long before the hearing commenced that the body was in room No 2

"Then we entered a small room There were two or three persons there whom I have no recollection of We went through that room into the larger room where the dead body was" (Vol 3, p 121, ll 4-6)

The small room is Room No 7 and the larger room is Room No 2

Mr Chaudhuri conveniently forgets that this was not a new case which Ram Sing Subha was making after the evidence of defence witness R N Banerjee, but that this was also his statement in the Defamation Case made more than ten years earlier, an extract from which is reproduced in paragraph 28 of the plaintiff's memorial, Ex J

"At 7-30 P.M. I heard cries in the "Step Aside", I went there and found that in a small room the dead body of the Kumar was lying upon a mattress over the floor, covered with a white cloth" (Vol III, p 99, ll 16-19)

It will be seen in fact that there is no material discrepancy whatever between Ram Sing Subha's present evidence and his deposition in the Defamation Case Mr Chandhuri at any rate was unable to point to any.

Contrary to the plaintiff's case, the defendants would say that room No 1 upstairs was used as the "Doctors' sitting room" (See, for instance, Bibhabati, Vol 12, p 249, ll 10-15) But in the commission stage their witnesses had certainly suggested a room on the ground floor for the purpose (*Shyamadas Banerjee*, Vol 1, p 269, ll 38-40 and *Jagat Mohun*, p 281, ll 35-37, p 293, ll 24-25) Satyendra himself admitted this at first, though only to pull himself up at once after this momentary lapse into truth

"My uncle when he came in with Dr Sarkar saw Col Calvert and Sen in the house

"Q—Where did he see them?

A—In the sitting room downstairs as he passed I think I made a mistake The ordinary sitting room downstairs, but that night my uncle saw the doctors in the sitting room upstairs" (Vol 16, p 486, ll 34-39)

IRRESPONSIBLE NATURE OF CRITICISM

To illustrate the irresponsible nature of Mr Chandhuri's criticism, I might perhaps also refer to a point which he made with reference to the witness's statement as to having seen Naga sannyasis at Darjeeling (Vol 11, p 68, ll 3-13) He suggested that having about this time got hold of Darsan Das alias Gopal Das, the rescuing sannyasi, P.W. 991, who was afterwards put into the box on January 9, 1935 (Vol 11, p 378), the plaintiff was now far the first time giving an indication of the presence of Naga sannyasis in Darjeeling through this witness Ram Sing Subha.

Mr Chaudhuri had only to refer to the evidence of Kamal Kamini, one of the earliest commission witnesses of the plaintiffs, who deposing on December 31, 1930, had said

"The plaintiff told me that a certain sannyasi took him away from Darjeeling I did not ask him who the said sannyasi was The plaintiff told me that the said sannyasi was a Naga (nude sannyasi)" (Vol 1, p 223, ll 22-25)

Thus would have shown how incorrect it was to assert that Ram Sing Subha was a screen on which coming events were made to cast their shadows

It is significant that Ram Sing Subha's evidence receives confirmation in several particulars from the side of the defendants themselves First, as to the presence of Dr B B Sarkar in the second Kumar's bed room at 7 or 7-30 P.M. on the evening of the 8th May As the learned judge points out, this witness was the first to introduce Dr Sarkar there (Vol 18, p 339, ll 23-24), none of the defendants' witnesses, neither Jagat Mohini (Vol 1, p 281) nor Shyamadas Banerjee (Vol 1, p 255), having named him in their evidence Calvert, specifically asked in Interrogatory No 15 if he remembered any other physician besides Nibaran Chandra Sen attending the Kumar during his last illness, did not mention his name all that he said was

"I remember the Kumar had his own private medical attendant who was present during his illness I cannot remember his name" (Vol 2, p 205, ll 6-8)

Dr Sarkar was known to Calvert at the time, as is shown by an entry in Dr Sarkar's diary (*Ex Z* (215), Vol 1, p 247) under date 'March, 7 "Saw with Dr. Calvert and Town Nurse Called on Dr Nibaran Chandra Sen" (*Entry not printed*) Even during Ram Sing Subha's evidence, as the trend of cross-examination suggests, the defendants were seeking to challenge the presence of Dr Sarkar The fact, however, had to be admitted by them at a later stage—by Bibhabati Devi herself, though without naming him (Vol 12, p 203, ll 32-33, p 248, ll 19-23, p 256, l 37 and pp 257-259), and by Satyendra-nath Banerjee (Vol 16, p 423, ll 1-3, p 475, ll 33-34, p 477, ll 4-18, pp 485-487 and p 494, l 3) Satyendra's diary also, as already seen, mentions Dr Sarkar as one of the doctors present at the time of the Kumar's death, though he tries to deny the fact in his present evidence (Vol 16, p 429, ll 2-4 and p 477) The defence, it may be pointed out, not only now admits Dr Sarkar's visit on the 8th evening, but relies on the entry in his diary under this date, "Kumar of Bhowal some hours" (Vol 1, p 248)

It further appears that Mr Chaudhuri now accepts Ram Sing Subha's statement that he was asked to purchase the *charpoy* for carrying the dead body (Vol 11, p 66, ll 35-36), though Satyendra was made to deny this in his examination-in-chief in course of which he stated

"It is not true that Ram Sing Subha purchased the *khat*, *ghee*, etc for cremation" (Vol 16, p 429, ll 35-36)

It was probably forgotten at the time that R N Banerjee had already committed himself on the point

"Going downstairs I along with others was arranging to bring a *charpoy* or *khatia* from inside the house Mr Wernicke's Munshi Ram Sing was responsible for the procuring of the said *charpoy*" (Vol 3, p 121, ll 30-32)

Then, again, though it is a small point, Ram Singh Subha's reference to the "women's cries" from "Step Aside" which he heard, finds indirect

support from the admission of Jagat Mohini that there were a number of females including "a few widows" in the house at the time the Kumar is said to have died, though, of course, she would advance the time of his death (Vol 1, p 295, ll 6 and 11-15)

Ram Sing Subha, again, was the first witness to give the story that the Kumar's body lay upon a mattress on the floor on the evening of the 8th May, that having been also his statement in the Defamation Case (Vol II, p 66, ll 12-13 and Vol III, p 99, ll 17-19), and this story afterwards came to be confirmed by the defendants' witnesses (Bibhabati, Vol 12, p 254, ll 24-25) It is nobody's case that Ram Sing Subha went upstairs on the morning of the 9th May

In my opinion, Mr Chaudhuri has wholly failed to show that the learned judge was at all wrong in accepting the evidence of this witness. In fact it will be hardly incorrect to state that almost on all points on which the defendants sought to contradict the witness, the facts have been either proved or admitted to be true.

"DEATH" BETWEEN 7 AND 8 P M

So far as the question of the hour of death is concerned, that evidence receives overwhelming corroboration from all the surrounding circumstances which, taken together, as the learned judge points out, indisputably establish the fact of death or apparent death at dusk, somewhere between 7 and 8 P M on the 8th May (Vol 18, p 355, ll 19, et seq) It is not necessary for me to recapitulate all these circumstances, which have been set out very carefully in the judgment of the court below, and some of which I have already considered at some length. It is enough for me to state that Mr Chaudhuri has been unable to advance any arguments which tend to weaken the force or cogency of the learned judge's reasoning or conclusion on any of these points. There are, however, one or two of these facts mentioned by the learned judge to which I might perhaps refer a little fully.

COLLAPSE ABOUT MID-DAY ON DEFENDANTS' OWN EVIDENCE

First, as to the course of the illness, pointing to death as near, and particularly the collapse which he finds occurred at mid-day. It is not denied that the second Kumar did fall into a state of collapse, and it is also admitted by the defendants that at about 11-30 A M or 12 noon, he suddenly showed certain alarming symptoms which made it necessary to send for Calvert at once, but before Calvert arrived, Dr Nibaran Chandra Sen was already there. According to Satyendra, as well as Bibhabati Devi, Dr Nibaran Sen came at about 12 noon and Calvert at about 2 P M, and it was between 4 and 6 P M that the hypodermic injection could be given to the Kumar after a great deal of persuasion. On Satyendra's evidence, Calvert had paid an earlier visit that morning between 9 and 11 A M. His cousin Shyamadas Banerjee, however, gives a different version. Shyamadas says that early that morning he received information that the second Kumar had passed a restless night, and so he called at "Step Aside" on his way to office to see the Kumar. He was there for about two hours and was told by Satyendra that the Kumar was in a serious condition. Calvert and Dr Nibaran Sen both came while he was there, and left after making arrangements for treatment and nursing (Vol 1, p 267, ll 21-36). According to this evidence, the serious turn in the illness must have commenced long before the time suggested by Satyendra or Bibhabati Devi, and the 2 o'clock visit of Calvert

spoken to by them cannot, therefore, but be an obvious concoction. Whether Calvert or Dr Nibaran Sen had paid an earlier visit in the morning or not, all the indications seem to point to Shyamadas' evidence being nearer the truth when he says that both these doctors were attending between 10 and 11-30 or 11-45 A.M. when he was there and when the Kumar's condition was already very serious. Calvert's condolence letter certainly points that way, for it says quite clearly that when "later in the day" the Kumar had a relapse of the colic "in a most intense form", the Private Secretary was able to secure Calvert's "early attention" to the case, which seems to me to rule out such a long interval as 2½ hours between the onset of the serious symptoms and the visit of Calvert, as suggested by Satyendra or Bibhabati Devi. It is also clear that the second and third prescriptions of the 8th May, *Ex 51 (b)* of Dr Nibaran Sen and *Ex 51 (c)* of Calvert, must have been made on this early mid-day visit of the doctors, and Calvert himself admitted, with reference to the latter prescription, that this was a stimulant mixture given when the collapse commenced (*Vol 2, p 214, ll 16-17*). As regards the "armoury prescription" in *Ex 51 (b)*, it hardly admits of doubt, that the tabloids mentioned in it, were all a provision against collapse, as put by Mr Chaudhuri himself to Col MacGilchrist (*Vol 9, p 360, ll 8-9*), Calvert suggested no doubt that the stimulant "Spt Ether mixture" and the "opium pills" in *Ex 51 (c)* were given as "substitutes for the real treatment" (*Vol 2, p 215, ll 34-35*), but that would imply, as the learned judge points out (*Vol 18, p 347, ll 31-37*), that there was no treatment up to at least 2 P.M. for the symptoms which on the defendants' own showing had appeared 2½ hours earlier.

Reference may be made in this connection to Dr Ashutosh Das Gupta's statements in the Sripur case and the Defamation Case, to which his attention was called in the course of his present deposition, and which he admitted to be true.

"Q—'After 2 P.M. the pulse began to be bad'—you said that in Sripur case? (*Ex 394 (11), Vol III, p 20, l 13*)

A—Yes, as it is there.

When I said it I believed it to be true. I do not say my recollection is better now.

Q—Before Sarada Babu, Magistrate, you said

'Collapse commenced from about 4 or 5 P.M. There was sinking of the pulse. Pulse could not be felt' (*Ex 395 (4), Vol II, p 364, ll 35-36*)?

A—Yes. I said then what I believed then to be true and in my recollection. I do not remember whether the prescription 'No 1 of *Ex 51 (c)*—the Spt Ether prescription—was given when the collapse began. Nor whether it was given at the end of the collapse. It is likely it was given when the Kumar was going towards collapse.

All my statements in my depositions in the Sripur case and before the two Magistrates who heard the Defamation Case, were then truly made and within my then recollection—what recollection I had then" (*Vol 16, p 303, l 30—p 304, l 22*)

CONDITION BEFORE EVENING

Jagat Mohini Dasi, the attending nurse, in her evidence also gives sufficient indications of a state of collapse early in the day. The defendants admit that she was called in on the day of the Kumar's death, and her

statement is that she came at 5 or 5-30 P.M., when both Col Calvert and Dr Nibaran Sen were there (*Vol 1, p 292, ll 38-40*). On her arrival, according to the instructions of the European doctor, she started rubbing the body of the Kumar with a white powder. The Kumar closed his eyes after looking at her face, and did not speak a word. The body was rather cold. The powder was rubbed for 10 or 15 minutes when this was stopped by Dr Nibaran Sen. The patient was involuntarily wetting his clothes (*ibid, p 281, ll 27-30, p 293, ll 5-8, ll 13-19 and ll 21-23*). Calvert remained there for about an hour after she had arrived (*ibid, p 281, ll 35-36 and p 293, l 24*), which means that he left at about 6 or 6-30 P.M., as is the plaintiff's case. According to Jagat Mohini, Calvert came again at 10 or 11 P.M. on receipt of a peremptory call in view of the Kumar's condition taking a sudden turn for the worse. Whether this part of her evidence is true or not, and in my opinion it is not, there could be no doubt that when she came in the afternoon she must have found the patient already in a very bad condition.

On the defendants' own evidence it seems to be fairly clear that *Ex 51 (c)* must have been given about the time the collapse commenced, an injection was given afterwards which had no effect, and then Jagat Mohini came and rubbed the white powder, which had to be stopped because it did no good either, as Bibhabati herself admits (*Vol 12, p 248, ll 17-18*). According to Mr Chaudhuri the injection was given at 4 P.M. Bibhabati would put it between 4 and 6 P.M. (*Vol 12, p 248, ll 7-14 and p 260, ll 6-11*), and Satyendra "in the afternoon", without naming the exact hour, his idea of "afternoon" being from 1 or 2 P.M. to 4 or 5 P.M., as he says at one place (*Vol 16, p 428, ll 24-25*), or from 12 noon to 4 P.M., as he says at another (*ibid, p 482, ll 1-4*). But it is not disputed that after the injection the Kumar's condition began to get from bad to worse (*Bibhabati, Vol 12, p 259, l 29—p 260, l 3, and Satyendra, Vol 16, p 428, ll 27-28*), and the injection must have been given for the collapse and not for biliary colic, as Calvert practically admits when he says

"Morphia was injected certainly, quite possibly combined with atropine

Q—What was the condition of the patient then?

A—The patient was collapsed" (*Vol 2, p 217, l 37—p 218, l 2*)

Morphia, as MacGilchrist points out (*Vol 9, p 350, ll 30-34*), is usually given with atropine, and according to Price, it is an usual stimulant treatment for collapse in arsenic poisoning.

BIBHABATI'S TEARS

A significant part of Bibhabati's evidence may also be referred to here. According to Satyendra he accidentally met his uncle Suryyanarain Mukherjee at Chowrasta or the Mall at about 6-30 P.M. on the 8th May (*Vol 16, p 484, ll 25-27 and p 501, ll 8-9*), and they at once fetched Dr B B Sarkar—whether it was at his instance or at the suggestion of his uncle, need not be now considered. He admits that when Dr Sarkar came, the Kumar was in a condition which he describes as "himanga" (ice-cold) (*Vol 16, p 485, ll 12-14*), though, of course, he had his own interpretation to give of the word "himanga", which would only make the hands and legs and the lower part of the body cold, but leave the upper part, from navel to neck, warm (*ibid, p 476*). Be that as it may, Bibhabati was asked if it was a fact that Dr Sarkar after examining the Kumar said that he had "gone past all

hope" (Vol 12; p 259, ll 6-7) This she would not admit "he did not say that in my presence" (*ibid*, l 8), she said, but could not help mentioning a fact which speaks for itself

"When my *mama* (meaning Suryyānaram) talked to me after the doctor had examined the Kumar, tears came into my eyes, but I did not cry aloud" (*ibid*, p 259, ll 10-11)

Satyendra was also questioned about it

"Q—What did he (Dr Sarkar) say after examining the Kumar?

A—He did not say it was hopeless but he said some such thing—that his condition was grave and serious"

(Vol 16, p 485, ll 37-39)

Again —

"Q—Did you not all think then the Kumar was dying?

A—I did not I do not know what others did I do not say that my uncle left because Dr Sarkar said the case was hopeful He waited for some time

Q—Do you suggest that your uncle, if he had human feeling, could leave at that time?

A—He also knew the Kumar would not die (*After pause*) He wanted to stay He must have realised the case was serious and wanted to stay" (*ibid*, p 487, ll 4-14)

This is probably as much as one could expect to get out of Satyendra Well might one ask, if the case was not hopeless about this time, what could have brought the tears to his sister's eyes?

SUPPOSED BUOYANT CONDITION TILL THE VERY LAST

Still the defendants would keep the Kumar in a buoyant condition, and even talking till within a few minutes of his death! According to Satyendra's diary the Kumar's last words to him a minute before life was extinct were "Tell Asha that I feel difficulty in breathing" (Vol 1, p 306, ll 9-11) Bibhabati, who would admit collapse, but not "profound collapse", even shortly before death, was asked

"Do you want to say the Kumar was talking during the profound collapse?

A—He talked even a little before his death

Q—But during what Dr Calvert calls 'profound collapse', did he speak?

A—He talked sometime till even some 15 minutes before his death" (Vol 12, p 226, ll 1-10)

Birendra Banerjee, the man who yielded only to Sarif Khan in his paroxysm of grief, gives a more graphic description

"He (Kumar) spoke five or ten minutes before his death I remember what he said He would say 'What hour of the night is it now, when will it dawn?'" (Vol 15, p 319, ll 5-7)

Jagat Mohini, however, as already noticed, would simply make him open his eyes once to have a look at her face, but not let him speak, and she would also have him "distorting his face convulsively" in pain while a man who

"seemed to be a doctor" was examining the chest with a stethoscope (Vol 1, p 293, ll 7-8 and p 294, ll 12-16)

It should not be forgotten that on the defendants' own case the period between dusk and midnight is a perfect blank so far as treatment is concerned, there being admittedly no prescriptions—not even one by Dr B B Sarkar. It is also not shown that there was any telegram sent to Bara Kumar after the 3-10 P.M. message (Ex 222, Vol I, p 300),—"Kumar is seriously ill. Frequent watery motions with blood. Come sharp",—though in reply Bara Kumar wired at 4-45 P.M. "Wire condition very often. Treat with best medical help. Wire immediately present condition" (Ex 260, Vol I, p 299). One wonders why Satyendra's resourcefulness failed him and did not lead him to suggest that he was in fact on his way to the telegraph office at about 6-30 P.M. to send a reply to Bara Kumar, when he was unexpectedly intercepted at the Chowrasta by his uncle Suryyanaram! The message would probably have read—"Collapse but not profound collapse. All night attendance of Civil Surgeon arranged. Macrae coming in the morning. No anxiety—at least till then. Meanwhile wire 1000 passage"

DR B B SARKAR'S VISIT ITS SIGNIFICANCE

The next important fact referred to by the learned judge is the visit of Dr B B Sarkar shortly after 6-30 P.M. on the 8th May, the significance of which cannot be missed. It certainly suggests that neither Calvert nor Dr Nibaran Sen could have been in attendance at the time, for it is unthinkable that an "ordinary" doctor of "no large practice" as, according to his son's evidence (D.W. 307, Vol 15, p 417, ll 10-11) Dr Sarkar was, should be called in, if the patient was still under the treatment of senior physicians like Calvert and Dr Sen. Satyendra himself would not think of it. "It is impossible", says he, "that I would suggest this" (Vol 16, p 500, l 35 and p 485, ll 8-9).

The visit is now admitted—since, as we have seen, Ram Sing 'Subba' mentioned it in his evidence. Satyendra would, however, like to say that Dr Sarkar was practically forced on him by his uncle Suryyanaram, he having been his uncle's medical attendant (*ibid*, p 428, ll 1-3 and p 485, ll 6-7). Satyendra's story is that he met his uncle quite by accident at the Chowrasta and told him about the Kumar's condition (*ibid*, p 475, ll 29-30), and in reply to his query, also informed him about the doctors who were attending (*ibid*, p 484, ll 40-41). He is positive he did not ask his uncle to get a doctor (*ibid*, p 475, ll 33-34), but when his uncle suggested it, he assented (*ibid*, p 485, ll 1-3). The story is, on the face of it, so utterly improbable that I for one refuse to believe it on Satyendra's uncorroborated testimony. If Suryyanaram was told that the Kumar was under the treatment of Calvert and Dr Nibaran Sen, one could understand his suggesting the calling in of a consultant of standing and experience, but he would certainly not go out of his way to get a junior like Dr B B Sarkar to come and see the Kumar, unless the patient was already *in extremis* and had been given up by the attending physicians. Bibhabati, on her part, does not profess to know whether Suryyanaram brought Dr Sarkar at Satyendra's request; she can neither affirm nor deny it (Vol 12, p 258, ll 13-19 and p 262, ll 14-23). Suryyanaram, it may be stated, had been staying at the time as a tenant in a part of "Balen Villa", the residence of Mahendra Nath Banerjee, the Government Pleader, and yet Satyendra, as he himself admits, had not cared to give him any information about the Kumar's illness (Vol 16, p 475,

ll 28-29 and p 501, ll 7-9) To my mind there is no answer to the suggestion that Dr Sarkar was called in by Satyendra as a last resort after Calvert and Dr Nibaran Sen had both left, having pronounced the case to be hopeless

A FEW FACTS

Mr Chaudhuri, however, contends that this is against positive testimony on the defendants' side, and he calls attention to the evidence of Satyendra (Vol 16, p 486, ll 9-12), Bibhabati (Vol 12, p 256, l 37—p 257, ll 1 et seq), Dr Ashutosh Das Gupta (Vol 16, p 298, ll 10-20) and Birendra Banerjee (Vol 15, p 353, ll 5-7). One has, however, to take note of a few facts also appearing in the defence evidence, in order to assess this testimony at its proper worth

- (i) Calvert in reply to Interrogatory No 15 does not mention Dr Sarkar as one of the physicians present during the Kumar's illness (Vol 2, p 205, ll 6-8), though, as appears from Dr Sarkar's diary under date 7th March, 1909, Dr Sarkar was known to him
- (ii) Bibhabati herself says that Calvert stayed on till dusk when he went to take his dinner (Vol 12, p 203, ll 6-7), and that Dr Sarkar also came at dusk (*ibid*, p 203, l 33)
- (iii) Jagat Mohini makes it quite clear that Calvert left the house about an hour after her arrival, i.e., at about 6 or 6-30 P.M. (Vol 1, p 281, ll 34-35 and p 293, l 24)
- (iv) The evidence as to whether Calvert and Dr Nibaran Sen were present at the time Dr Sarkar examined the Kumar is wholly discrepant

DISCREPANT EVIDENCE

Bibhabati says that Dr Sarkar came into the Kumar's room with Suryyanarain, and that she, her brother and perhaps Dr Das Gupta were present there (Vol 12, p 257, ll 2-3 and ll 10-13). Neither Calvert nor Dr Nibaran Sen came in with Dr Sarkar—this is what she remembers (*ibid*, p 259, ll 4-5). According to her, Dr Sarkar was there for about 7 to 10 minutes, and then left—she cannot say if he left the house altogether or stayed in, making it perfectly clear that she did not see him again in the course of that evening (*ibid*, p 257, ll 26-27). She is, however, careful to add that Calvert and Dr Nibaran Sen were constantly coming and going—"every 5 or 7 minutes", showing that they were in the house all the time (*ibid*, p 257, ll 1-3 and p 259, ll 3-4). She forgets that she had herself sent away Calvert for an hour or two for dinner

Dr Das Gupta has a different story to tell. He is positive that when Dr Sarkar examined the Kumar with a stethoscope and felt his pulse, Calvert and Dr Nibaran and he himself were present (Vol 16, p 298, ll 18-20 and p 316, ll 8-15). He is a witness who would not, like Bibhabati, keep Calvert at "Step Aside" right from 2 P.M. to midnight with only a break for dinner, but would bring him into the house as many as six or seven

times (*ibid*, p 297, ll 32-33) By the way, Dr Das Gupta swears that Satyendra was in the house from 5 P M to 8 P M on the 8th May (*ibid*, p 298, ll 30-32) how then could Satyendra have met his uncle at the Chowrasta at 6-30 P M ?

Satyendra, as is to be expected, attempts a bold reconciliation between the two conflicting versions. Conscious no doubt that his "recollection" may be getting mixed up with his "impression", having regard to the fact that he is "speaking of things that happened a quarter of a century ago" (*Vol* 16, p 485, ll 27-30), he has first no recollection whether the other two doctors were in the room when he himself walked into it with his uncle and Dr Sarkar, though he was positive they were in the house (*ibid*, p 477, ll 4-19), and repeats the same statement later

"When Dr B B Sarkar called, my uncle, Bhababati and the nurses and some members of the staff were there. About the other two doctors, Dr Calvert and Nibaran, they were in the house, but I do not remember if they were in the room" (*ibid*, p 486, ll 9-12)

Asked, however, if Dr Sarkar came into the Kumar's room *again*, he adds

"A—Might have

Q—Do you remember?

A—I think I do

When he came into the second Kumar's room, the three doctors, Dr Calvert, Sen and Ashu doctor were in the room. Dr Sarkar came into the room with them.

Q—Did Dr Sarkar examine your brother-in-law a second time?

A—Yes

Thus I remember. At that time my uncle had left "Step Aside". On this second occasion Dr Sarkar was over this examination shorter time than the first. The four doctors remained in the room for about 15 minutes. Then they all came out of the room. It was after this that Col Calvert went for his dinner" (*ibid*, p 486, ll 20-34)

Brendra Banerjee, whose capacity for lying is matched only by that of some of the other witnesses for the defence, does not know if Suryanarain came to "Step Aside" at all on the 8th evening (*Vol* 15, p 346, ll 10-13 and p 354, l 2), but is in a position to state that the Bengalee doctor, whom he cannot name, did examine the patient's heart and feel his pulse in his presence (*ibid*, p 354, ll 20-22). He is quite definite that Calvert was not in the room at the time, and as for Dr Nibaran Sen, he does not remember where he was then, but his "impression" is that they were in the room in which doctors used to sit (*ibid*, p 353, ll 1-10). He was asked if he would call in another doctor when Calvert and Dr Nibaran Sen were actually in the house and let him see the patient in their absence, and he gave a characteristic answer

"Yes, I would, if I have money, and I might have got him to see the patient without telling the other two

Q—Would it be a normal thing for you to do?

A—Might be" (*ibid*, p 353, ll 11-17)

IMPROBABILITY OF DEFENDANTS' STORY

It is scarcely necessary to add that Dr Sarkar, a junior practitioner, as he was, would have himself hesitated twice before perpetrating such a gross outrage upon professional ethics as is sought to be imputed to him. In my opinion, there is no possible escape from the conclusion arrived at by the learned judge that neither Calvert nor Dr Nibaran Sen was at the house when Dr Sarkar was brought in (*Vol 18, p 356, ll 25-29*). It will be observed that Bibhabati herself is not so positive about the presence of these two doctors at the time as her brother or Dr Das Gupta or Birendra Chandra Banerjee. She only "thinks" or "believes" they were there.

"On preceding Saturday when Calvert went to take dinner, Nibaran Babu remained, *I think*" (*Vol 12, p 248, ll 39-40*)

"When my maternal uncle brought a doctor, Dr Calvert was in the house, *I believe*

To Court Not in the patient's room, but in the side room which was a sitting room" (*ibid*, p 249, ll 8-11)

Again

"When Suryyanaram came with the doctor, Dr Calvert and Nibaran were in the "Step Aside", *I believe* I have direct knowledge in the sense that they were coming and seeing the Kumar every now and then and that was not possible unless they were in the house" (*ibid*, p 256, l 36—p 257, l 2)

Further on

Q—I put it to you that you cannot deny on oath that when this doctor came, Doctors Calvert and Nibaran were not in the house?

A—I say they were in the house

Q—Can you swear they were?

A—I did not see them seated in the house, but they were coming in so frequently that they must have been in the house"

(*ibid*, p 258, ll 28-33)

Mr Chaudhuri complains that the learned judge overlooks the fact that the Civil Surgeon would not have been allowed by the Ram to go away, as she is not said to have been in the conspiracy. The short answer is

(i) Calvert did in fact go away according to Bibhabati herself—it may be for dinner,

(ii) Jagatmohini also says, he left at about 6 or 6-30 P M, and

(iii) if Bibhabati or Satyendra or Dr Ashutosh Das Gupta is to be believed, none of the people at "Step Aside" had any fear that the Kumar was going to die, and there was no reason, therefore, why Calvert should have been unnecessarily detained (*Bibhabati, Vol 12, p 222, ll 25-26—death was most unexpected, p 224, l 23—did not know he was dying, p 236, ll 24-26—never thought his case was hopeless and he was going to die, p 259,*

ll 31-32—did not think he was dying, could understand his illness was serious, *Satyendra*, Vol 16, p 485, l 22—never thought it hopeless at any time, p 487, l 10—uncle also knew the Kumar would not die, *Ashutosh Das Gupta*, Vol 16, p 322, ll 22-23—before death, did not understand, until death actually occurred, he would die, *ibid*, l 30—even at 10 P M such a thought did not occur)

ENTRY IN DR SARKAR'S DIARY

Mr Chandhuri next calls attention to the entry in Dr Sarkar's diary under date the 8th May "Kumar of Bhowal some hours" (Vol 1, p 248), and points out that it does not mention that the Kumar was dead, and in this connection he refers to the evidence of D W 426, Tarapada Banerji, then spending the week-end as a guest of Dr Sarkar at his house "North View", who says that he had a conversation with the doctor about the second Kumar the same night at about 10 P M, but heard the news of death only the next morning, showing that the Kumar could not have died before Dr Sarkar returned home from "Step Aside" (Vol 17, p 346, l 29—p 347, l 1) The diary, however, appears to me to support the plaintiff's case in so far as it mentions "some hours" This in fact makes it difficult for Mr Chaudhuri to dismiss Dr Sarkar from "Step Aside" after only a few minutes' stay, as he would have liked to do, and he is obliged to keep him there till about 9 P M, but not beyond, the improbability of which, however, will be at once apparent. Admittedly, the Kumar's condition was getting from bad to worse, and if Dr Sarkar could stay till 9 P M, it is unthinkable he should be allowed to go away until at least Calvert had returned from dinner, which according to Satyendra Calvert did after about an hour and a half (Vol 16, p 484, ll 18-19) It is not the defendants' case that Dr Sarkar left with Suryyanaram according to Satyendra, Suryyanaram being a sick man, was asked to go away, though he himself wanted to stay (*ibid*, p 487, ll 17-18) Bibhabati also says the same (Vol 12, p 219, ll 11-14) Dr Sarkar, however, stayed back. Satyendra states in fact—"He left leaving Dr Sarkar behind" (Vol 16, p 487, l 19) If the defendants are right that the Kumar died at about midnight, it is only reasonable to suppose that Dr Sarkar should have waited till then, and in that case he could not of course have any conversation with Tarapada Banerji about the Kumar at 10 P M as this witness states. The more consistent view would undoubtedly be that Dr Sarkar left at about 9 P M because the Kumar was dead, and as the learned judge points out (Vol 18, p 356, ll 37-39), this would be quite in keeping with what any decent Bengalee might be expected to do in the circumstances—not to leave immediately after death, but to wait for some time till the body was about to be taken away for cremation. As for the diary not mentioning the Kumar's death, this is wholly inconclusive in the first place, it is not shown that it was Dr Sarkar's practice to record in it the death of every patient, and secondly, according to Satyendra's diary Dr Sarkar would be present at death, and yet there would be no record of the fact of death in his diary.

TARAPADA BANERJI'S EVIDENCE

As regards the evidence of Tarapada Banerji, it comes in a questionable shape and one is not much impressed by it. None of the other defence witnesses mention his name at all, except Anuplal alias Neru Goswami,

also of Darjeeling, D W 411, (Vol 17, p 315, ll 17-18), who was his friend for over thirty years, and was examined only a day earlier (*ibid*, p 350, l 9 and ll 25-26) On his own evidence the witness hears of the Kumar's death in Commercial Row at 8 A.M. on the 9th morning, and he at once proceeds to "Step Aside", though nobody asks him to do so and he can apparently suggest no reason for it (*ibid*, p 346, ll 34-37, and p 347, ll 6-7) He did not know the Kumar (*ibid*, p 347, l 9), still the news of his death interests him so much that not only does he go there, but he observes the dead body so carefully that even twenty-five years after he remembers that it was the uncovered face of the Kumar which he saw that morning One wonders what led him to treasure up in his memory such useful evidence for the defendants Dr B B Sarkar's son, Bejali Behari Sarkar, had been already examined by the defendants, but it is surprising that no question was put to him as to when his father returned, from "Step Aside" on the 8th evening, or whether Tarapada Banerji was then staying with them as their guest, much less whether Dr Sarkar came and made any report about the Kumar to anybody in the house According to Tarapada Banerji, Dr Sarkar's son was there on that day (*ibid*, p 351, l 11) It is also worthy of note that Dr Sarkar's widow was not called, though it appears from Tarapada Banerji's evidence that she was living (*ibid*, p 347, ll 35-39)

The defendants overlook the fact that in trying to exclude Dr Sarkar from the house at the time the Kumar is supposed to have died, they get involved in hopeless inconsistencies For one thing, as pointed out before, this would mean their making a case contrary to Satyendra's own diary which expressly mentions his name as one of the doctors said to be attending at the time of death Satyendra no doubt attempts to explain away the entry

"As he (Dr Sarkar) did attend on the night of death and as he was there up to about a few hours before the death of the Kumar, I did not separately write his name, but mentioned his name in the list of the doctors who attended the Kumar at the time of his death" (Vol 16, p 477, ll 32-35)

But on such an explanation, this entry could hardly be of any use to the defendants, for the names of the other doctors might equally have been put down, though they were not present at the hour of death The fact seems to be, as the learned judge puts it pithily

"He (Satyendra) says, it is true of all except B B Sarkar It is true of nobody except Dr B B Sarkar and Dr Ashutosh" (Vol 18, p 357, ll 17-18)

EVIDENCE OF MAITRA GROUP

It remains now to refer to a body of important evidence, coming from four witnesses on the plaintiff's side who have been designated by Mr Chaudhuri as the "Maitra group" or the "Professorial group" These are

- (1) P W 578, Principal S N Maitra (Vol 8, pp 12-16),
- (2) P W 840, Dr Radha Kumud Mukherji (Vol 9, pp 436-438);
- (3) P W 841, Dr Hiralal Roy (Vol 9, pp 439-442) and
- (4) P.W 1021, Nagendra Nath Rakshit (Vol 12, pp 10-11)

They were all admittedly staying at the Lewis Jubilee Sanitarium in the month of May, 1909, and their concurrent testimony is that one evening while they were sitting in the Common Room of the Sanitarium, they got the news of the Kumar's death some time before the dinner hour, which was 8 or 8-30 P.M. The messenger or messengers who brought the news asked for men to carry the dead body to the burning ground. None of them, however, went. If this evidence is accepted, there can be no doubt that it fully proves the plaintiff's case of death at dusk. As the learned judge points out (*Vol 18, p 361, ll 9-10*), there is absolutely nothing going to the credit of these witnesses, nothing even suggested, and he considers them to be "gentlemen of unimpeachable credit". They are all absolutely disinterested witnesses, and one has only to look at their evidence and at their standing and status as elicited from them, to be convinced that they have not come to pledge their oath in the interest of any particular party. They have given perfectly straightforward evidence without trying to say a word more than they recollect. Mr Chaudhuri himself frankly conceded before us that he did not impeach their honesty or ascribe any *malafides* to them.

MR CHAUDHURI'S COMMENTS

Mr Chaudhuri's comments on the evidence of these witnesses may be summarised as follows —

- (i) that the evidence is not admissible under the principle of *res gestae*,
- (ii) that even if admissible, it is of very little evidentiary value, and
- (iii) that the evidence is really helpful to the defence

INADMISSIBILITY AS RES GESTAE

As to (i), the point was taken in the trial court, and this is what the learned judge says

"I find that these gentlemen did receive the news of death from a messenger in the Common Room of the Sanitarium before 8 P.M. It was contended that their testimony was not evidence, but hearsay. It was part of the *res gestae*, like sending to an undertaker in England" (*Vol 18, p 361, ll 39-43*)

Mr Chaudhuri suggests that a portion of the entry in Satyendra's diary is taken where it is stated that he sent for men to the Sanitarium and thus is sought to be connected with the message supposed to have been brought to the Common Room, though the man who brought it is not shown to have come from "Step Aside", and though Satyendra's diary refers to a messenger sent after death at midnight. It is contended accordingly that the evidence is not admissible.

It is true that the Maitra group are unable to say who brought the news to them, or whether it was brought by one or more than one, but they are definite that the person or person who came made a request for men to carry the dead body, which means that the message came from "Step Aside". To make the evidence admissible, it is not at all necessary to connect it with the entry in Satyendra's diary. Death of the second Kumar was undoubtedly a fact in issue, and the sending out of a messenger or messengers

shortly after the event to collect men for the funeral would certainly be part of the *res gestae*, it would be the event speaking for itself, not what the people said when talking about it. I do not see why in these circumstances, s 6, or failing thus, s 7 of the Indian Evidence Act should not apply, and the fact spoken to by the witnesses should not be relevant as a fact which was the "occasion" or "effect" of a fact in issue. In any case, it would be admissible under s 9, as being a fact which "fixed the time" at which death happened, or alternatively, under s 11, as a fact which would be "inconsistent with" death at midnight, or which by itself and also in connection with other facts would make death at dusk "highly probable" and death at midnight "highly improbable", death at dusk or death at midnight being a fact in issue or relevant fact. In my opinion there is no substance in Mr Chaudhuri's point.

SUPPOSED CONTRADICTION WITH OTHER EVIDENCE

(ii) As to Mr Chaudhuri's next objection, he first invites the court to contrast this evidence with that of two other witnesses on the plaintiff's side, Padmini Mohon Neogy, P W 655, (*Vol 8, pp 249-255*) and Surendra Nath Roy Chowdhuri (*Vol 2, pp 468-481*), without, however, accepting the evidence of either. Both these witnesses, it is admitted, were staying at the Sanitarium at the time.

PADMINI MOHON NEOGY

Padmini Mohon Neogy says that a man came to the Sanitarium at about 7-30 or 8 P M to call men for the cremation, giving the time "by guess" (*Vol 8, p 250, ll 12-13*). In cross-examination it is put to him, without showing him the statement, that in the Defamation Case he had stated that the party from the Sanitarium went to "Step Aside" at 7-30 P M. He does not remember, but if he had said so, it must be "substantially correct—not counting a difference of 10 or 20 minutes", as says (*ibid, p 251, ll 10-11*). Mr Chaudhuri finds in this a ground to argue that as this witness was at "Step Aside" at 7-30 P M, the news must have been received at the Sanitarium about an hour earlier—that is to say, about the time Satyendra is supposed to have met his uncle at the Chowrasta when the Kumar was still alive,—and that would be wholly at variance with the evidence of the Maitra group.

All I need say is that Mr Chaudhuri must find his case very weak indeed if he has to rely on such alleged discrepancies. In the first place, it would be hardly fair to pin down the witness so rigidly to his timings, which, depositing after so many years, he could have given only by guess. Secondly, his present evidence shows that he got the news of death at 7-30 or 8 P M, and thus quite fits in with the timings indicated by the Professorial group, none of them are definite as to the precise hour when they heard the news—all that they remember is that they got it before the dinner hour which they fix at about 8 or 8-30 P M (*S N Maitra, Vol 8, p 12, ll 20-21, Radha Kumud Mukherji, Vol 9, p 437, ll 6-8, Hiralal Roy, Vol 9, p 439, ll 31-32, Nagendra Nath Rakshit, Vol 12, p 10, ll 33-34*). There is no cross-examination of any of these witnesses on the point. As for Padmini Mohon Neogy's supposed statement in the Defamation Case, his deposition has not been put in evidence by the defendants, and no

particular passage from it was put to the witness, as undoubtedly would have been done under s 145 of the Indian Evidence Act, if there was a real contradiction. An extract from his deposition as D W 21 in the Defamation Case is quoted in paragraph 27 of the plaintiff's memorial to the Board of Revenue, *Ex J* and is to this effect:

"They with a party of 7 or 8 men went from the L. J Sanitarium and followed the corpse that very night *between 8 and 9*, but that they returned from the cremation ground on the approach of rain and storm" (*Vol III, p 98, ll 29-33*)

It will not be wrong, therefore, to hold, as the learned judge does, that there is "no inconsistency in his account in any material particular" (*Vol 18, p 365, ll 8-9*). In any case any such trivial discrepancies as Mr Chaudhuri indicates would leave the plaintiff's story wholly unaffected in its broad outline.

SURENDRA CHANDRA ROY CHOWDHURI

As regards the other witness Surendra Chandra Roy Chowdhuri, Mr Chaudhuri tries to show, unsuccessfully, again, as I think, that he gives a version materially different from the Maitra group in so far as he says that the messenger who came to the Sanitarium never asked for men to carry the dead body. One fails to see what is the point in this criticism—whether it is merely to show a contradiction in the evidence on the plaintiff's side, or to falsify the testimony of the Professor witnesses. Their testimony is in fact concurrent and wholly unshaken by cross-examination. S N Maitra first states no doubt that the man who brought the news "presumably" made a request for men to carry the dead body to the burning ghat, but at once adds "Of the request I am absolutely sure" (*Vol 8, p 12, ll 32-34*). The only cross-examination is if he knew the name of the man, and if he wanted to say that the man burst into the Common Room "as a bomb-shell" (*ibid, p 15, ll 10-14*). Radha Kumud Mukherji says "They wanted to find out if men could be had to help them to carry the corpse. So far as I can recollect only one man came and asked for this help" (*Vol 9, p 437, ll 2-4*). In cross-examination he states "I cannot recall the appearance of the person or persons who gave the death news, nor what he said except generally that he announced the death" (*ibid, p 438, ll 27-28*). Hiralal Roy similarly says in his examination-in-chief "The death news was brought to us as our help was wanted to carry the dead body to the cremation ground" (*Vol 9, p 439, ll 33-34*), and in cross-examination "I do not remember exactly what he said" (*ibid, p 441, ll 27-28*). Nagendra Nath Rakshit's statement, there being no cross-examination on the point, is "We were seated as usual in Nripendra Naram Hall, used as a Common Room, when one or two men came, said that the Bhowal Kumar was dead, and asked for men to help to cremate him" (*Vol 12, p 10, ll 31-33*). There can be no doubt that the evidence which these gentlemen give has the ring of truth in it, and merely because one or two of them cannot recall the exact words of the messenger or messengers, it does not follow that they are not giving a true story.

As for the supposed contradiction with the evidence of Surendra Chandra Roy Chowdhuri, this is what this witness says in examination-in-chief:

"Q—From whom did you hear it (news of the Kumar's death)?"

A—A man on coming out from the Kumar's house gave out that

Q—What did he give out?

A—The Kumar has died, we want men for the cremation" (Vol 2, p 470, ll 3-7)

In cross-examination Surendra Chandra Roy Chowdhuri gives the same answer

"We remained sitting he came to us and told that he also wanted men for cremation from me I requested my own officer to go" (ibid, p 475, ll 29-31)

There is clearly no discrepancy so far Mr Chandhuri, however, relies on the answer to the next question

Q—Is this statement 'I had no talk with him' true?

A—He was making a general appeal I volunteered to send my officer whom I requested to go I had no personal talk with him" (ibid, ll 32-34)

Taking the answer very strictly, this might perhaps be said, to imply that the messenger made no personal appeal to the witness for help, but it certainly does not and cannot mean that he did not ask for men to carry the dead body Where, then, is the contradiction?

It is to be observed, again, that the statement which is put to the witness is not shown to have been taken from any previous deposition to which his attention was called. He had admittedly given a statement to a Deputy Magistrate at Rangpur on the 21st July, 1921, and also deposed in the Defamation Case about two years later (Vol 2, p 471, ll 20-23, and p 474, ll 17-18) The court deposition was not shown to him in cross-examination, but only the Rangpur statement (Vol 2, p 476, l 4), which was marked Ex Z(338) (a), (Vol II, p 256), this being in the form of a series of answers to questions—presumably the questions, (Ex 445, Vol II, p 246) which had been framed by R C Datta, D W 435 (Vol. 17, p 412, l 24) There is no reference in it whatever to any man having come to the Sanitarium with the news of death If, therefore, the statement which was put to the witness was taken from his deposition in court, as was presumably the case, one fails to understand how in view of s 145 of the Indian Evidence Act it is open to Mr Chandhuri to suggest that there was any contradiction between what he then said and his present evidence

"UNREAL" AND "UNNATURAL" EVIDENCE

Mr Chandhuri next comments on the character of the evidence of the Maatra group, which he says, "has no body in it", is "unnatural" and "unreal", a very picturesque characterisation no doubt, but perhaps more appropriately applicable to the comment itself He refers particularly to the evidence of Principal S N Maatra, the "precursor" of the group, as he calls him, as to who brought the news of death to the Sanitarium Common Room It is a strange story altogether, he says, which the witness tells—a messenger bursting in like a "bomb-shell" (Vol 8, p 15, l 11), this being a word which learned counsel must himself have put to him in cross-examination The witness explained what he meant by it "I call him a bomb-shell, as he broke up our talk" (ibid, l 15)—a fact which is testified to also by Hiralal Roy "After the death news, our gathering broke up" (Vol 9, p 439, ll 36-37)

FALSE NOTIONS OF PROPRIETY BORROWED FROM THE WEST

Apparently, according to Mr Chaudhuri there would be nothing wrong in sending for men from the Sanitarium for the cremation, as admittedly Satyendra did it himself, but what shocks him is that instead of a durwan carrying a "chut" to Rajendra Nath Sett, and Rajendra Nath Sett going round to collect men from among the other boarders (*Satyendra*, Vol 16, p 478, ll 22-29 and Vol 1, p 306, ll 13-14), a messenger should walk into the Common Room straight to ask if anyone would come and assist at the funeral, though the Common Room was a public place to which admission was unrestricted and where one would normally expect of an evening most of the boarders to foregather. If I may say so with respect, a comment of this kind only illustrates the danger of one being steeped in notions of propriety and decorum borrowed from the West and not being able to shed them in judging the actions of people of this country. As even a Bengalee schoolboy knows, to assist at a cremation is considered a most meritorious form of friendly service, and no Hindu visiting or sending to the house of a stranger, much less to a common meeting place like the Sanitarium, to ask for such help need consider himself guilty of an act of gross impertinence, say what Mr Chaudhuri may.

The evidence on the plaintiff's side, it will be observed, is consistent and definite that a messenger or messengers came to the Sanitarium, not to proclaim the news of the Kumar's death, but to try and procure men who might help in carrying the dead body to the cremation ground. One may be forgiven, therefore, for pointing out that it was not like the visit of a herald come to announce "*le roi est mort*" or "*venez enterrez*", as Mr Chaudhuri would put it. This is a bit of cheap sarcasm which counsel for the respondent might well fling back at him, for it is Mr Chaudhuri's witness Satyendra, who, contrary to his own diary, is now very anxious to maintain that he sent out "chuts" at dead of night only to convey the news of death, and not to get men for the cremation (Vol 16, p 748, ll 26-29), as if there would be any object in disturbing people at that hour to announce an event in which they were not likely to be interested. Conduct of this kind does not apparently strike Mr Chaudhuri as "unnatural" or "unreal".

I find it difficult to appreciate what Mr Chaudhuri means by saying that the evidence of the Maistra group has "no body in it" if he is only reproducing in effect an observation which fell from one of my learned brothers in the course of argument that the evidence is "not clothed with any kind of dress which would give it the appearance of reality", all I can say is that truth disdains to be decked in tinsel trappings.

NO DETAILS OF CONDOLENCE MEETING

Another infirmity which, according to Mr Chaudhuri, attaches to this body of evidence, is that the witnesses, though remembering the incident connected with the delivery of the news of death at the Sanitarium, have little or no recollection of the details of the condolence meeting which was held there on the 16th May, 1909. Every one of these witnesses, it appears, was cross-examined about this meeting. Principal Maistra does not remember the date certainly, but might have attended it (Vol 8, p 13, ll 36-39). His mind, he frankly says, is a perfect blank with regard to it, but when it is suggested that his name appears in the list of persons present, he is prepared to admit he was there (*ibid*, p 14, ll 7-9 and ll 34-35 and p 15, ll 1-2).

Radha Kumud Mukherji similarly says "Of the condolence meeting I have no recollection, but if anybody says I attended it, I would not deny it. I do not remember who the Chairman was. I do not see any reason to deny that I was present at the meeting, if it is in the press report" (*Vol 9, p 438, ll 31-16*) Hiralal Roy remembers the meeting, and remembers too that Prof Maitra, Radha Kumud Mukherji and perhaps Nagendra Nath Rakshit were also there, and Prof Maitra sang at the meeting (*Vol 9, p 440, ll 1-4*) He had no idea that it was a faked meeting (*ibid, l 24*) He recollects that the meeting began in the late afternoon, but not how long it lasted or other details (*ibid, p 442, ll 9-13*) Nagendra Nath Rakshit admits having attended the condolence meeting, but cannot say if Prof Maitra was there - it was held most probably at or about sunset (*Vol 12, p 11, ll 11-13 and ll 23-24*)

If the cross-examination was directed to a memory test, the learned judge has, in my opinion, given adequate reasons for holding that the witnesses have all stood such test successfully (*Vol 18, p 361, ll 20-37*) There would be no point whatever in their admitting or denying their presence at the meeting. Hiralal Roy and Nagendra Nath Rakshit in fact both say that they attended, though, be it noted, their names are not to be found in the list of persons present, produced by the defendants (*Ex Z(118), Vol 1, pp 462-463*) The evidence of this group of witnesses regarding the condolence meeting seems to me only to confirm its truthful character.

Mr Chaudhuri next points out that Prof Maitra admits in his examination-in-chief that Haran Chandra Chakladar was present in the Common Room when the news of death was received (*Vol 8, p 12, l 26*), but modifies his answer in cross-examination when it is put to him that he said so because Haran Chandra Chakladar was one of the "National College group" who used to be generally present there (*ibid, p 15, l 28-p 16, l 6*) This is really no contradiction, but only a plain, honest explanation of his first statement.

RECOLLECTIONS "MIXED UP"

Mr Chaudhuri's further attack on the evidentiary value of this body of testimony, particularly as regards the news of death having reached the Sanitarium in the evening of the 8th May, is that the witnesses having read about the case in the newspapers and discussed it among themselves, must have mixed up their recollection with the impressions they had so formed. In particular he suggests that they were making a confusion between a premature report of death which they might have heard and an actual request for men to carry the dead body.

This is partly the explanation which Bibhabati herself suggested in her evidence.

"Q—Are you aware up to date that Prof Radha Kumud Mukherji, Prof Hiralal Roy, Principal S N Maitra and some other gentlemen have deposed in the case about word being brought to them at the Sanitarium about second Kumar's death in the evening before dinner time?

A—I read that in the papers.

Q—Would you kindly tell the court that they deliberately perjured themselves in giving their evidence? (*Objected to Allowed*)

A—I do not think they gave false evidence, but I think they made a mistake after the lapse of time and after continuously hearing about it" (*Vol 12, p 253, ll 28-36*)

Nobody would expect her hard-headed brother to be equally charitable. He would spare Dr. Radha Kumud Mukherji to the extent of not imputing to him a "sinister motive", having regard to his position (*Vol 16, p 479, ll 17-18 and ll 22-23*). But as regards Principal Maitra, he is perfectly downright, and says, "His statement is false" (*ibid, ll 19-20*).

It will be seen that Principal Maitra does not speak to having had any discussion with any body regarding this matter. Radha Kumud Mukherji, however, says that he had heard about the supposed return of the Kumar after death (*Vol 9, p 437, ll 32-37*), and also that he had read Principal Maitra's evidence in the 'Statesman' (*ibid, ll 38-39*). He had carefully noted that evidence on account of its "possibilities" for him, as he puts it the reading of it had refreshed his memory on the particular point (*ibid, p 438, ll 9-10*). The witness had also a talk with Dr. Hiralal Roy on the subject of their stay at Darjeeling and other incidents to which he had deposed (*ibid, p 438, ll 19-25*). Hiralal Roy also admits having come to know from newspapers that the Kumar, reported dead, had come back (*Vol 9, p 441, ll 3-4*) and having had a discussion about the Darjeeling incident with Radha Kumud Mukherji (*ibid, ll 14-15*). He says quite frankly that a gentleman had seen him with a view to his giving evidence in the case, from whom he learnt that Principal Maitra had already deposed. His discussion with Radha Kumud Mukherji is said to have taken place before the visit of this gentleman (*ibid, ll 17-18*). Nagendra Nath Rakshit merely states that he recalled the incident when he read about the case in the papers. He also read that Principal Maitra had deposed, but did not read his deposition except so far as it was in the 'Statesman' which was very short (*Vol 12, p 11, ll 1-5*).

There is no cross-examination of any of the witnesses that their memory of the past might have been distorted by what they had read or heard. Their evidence is indeed so straightforward that I do not think there can be any room for such a suggestion. They are witnesses who would not pledge their oath to any thing as true to their recollection, if they were not sure about it. A mistaken recollection is not of course incompatible with honesty, but an honest witness, if he says he recollects, may be taken to be giving his recollection correctly, and not mixing it up with extraneous impressions. Prof. Maitra says quite definitely that he has a "vivid recollection" of a man coming with the news of death and breaking up the party (*Vol 8, p 15, ll 13-14*), while Radha Kumud Mukherji says "I definitely remember the news came" (*Vol 9, p 437, l 6*). The witness has a bad memory for dates, but not for "incidents" (*ibid, l 21*). Hiralal Roy was asked "This is a matter that took place about 25 years ago—can you be definite about it? About the time?" His answer was "Yes, about the time and the man coming to announce death" (*Vol 9, p 441, ll 34-36*). Nagendra Nath Rakshit on his part is not so definite. He does not remember at what precise hour the messenger or messengers came, but it was before 8 P.M. (*Vol 12, p 12, p 10, ll 33-34*). Where the witnesses are hazy or indistinct in their recollection, they do not for a moment conceal the fact.

FUTILITY OF MR. CHAUDHURI'S ARGUMENT

It will not do, therefore, for Mr. Chaudhuri to try and explain away all this evidence by referring to the unconscious effect of reading and discussion on the minds of the witnesses. Nothing is gained by his citing in this connection as a sort of authority what he describes as "a valuable answer" which was elicited from plaintiff's witness Surendra Chandra Roy Chowdhuri,

who, a person of undoubted position and standing in life, with no object to gain, and no interest to serve, comes in all the same for castigation at Mr Chaudhuri's hands as "one of the biggest liars who have deposed in the case" This witness, as pointed out before, had given a statement to a Deputy Magistrate at Rangpur in 1921 (*Ex Z(338) (a), Vol II, p 256*), which was put to him in cross-examination, and he was asked if he had the same memory at the time of giving evidence as when he had made that statement He answered "On account of repeated discussions, association of ideas is the same The association of ideas commenced from the time I made this statement" (*Vol 2, p 476, ll 10-14*) A perfectly sound psychological proposition, however infelicitously expressed—which nobody is concerned to dispute But Mr Chaudhuri does not care to elucidate how "repeated discussions" operating through the laws of association of ideas, must inevitably produce distorted images in the mind With all respect, an argument of this kind need only be stated to demonstrate its utter futility

FALSE ANALOGY WITH DEBABRATA MUKHERJEE'S EVIDENCE

Mr Chaudhuri quotes also a comment which the learned judge makes in discussing the evidence of one of the defendants' witnesses, Debabrata Mukherjee (*Vol 2, pp 113-121*), concerning which he remarks "That shows that things were being heard, and getting mixed up with memory" (*Vol 18, p 306, ll 8-9*), learned counsel's point evidently being that if such a theory is legitimate to explain away the testimony of this witness, it might be equally applicable in the case of the Maitra group Mr Chaudhuri forgets that it all depends on the quality of the evidence given by the witness or witnesses, for it cannot be laid down as a general proposition that if things are heard, they must get "mixed up" with memory in every case

So far as Debabrata Mukherji is concerned, his evidence itself shows that the remark of the learned judge about it is more than justified He is a retired member of the Bengal Judicial Service who was posted at Dacca in 1921, and speaks to having met and talked to the plaintiff on several occasions at Buckland Bund during his stay there He had previously given a statement to R C Datta, Deputy Magistrate, in the course of the Landsay enquiry (*Ex Z(110), Vol II, p 231*) At the end of it he appended a further statement to this effect

"I remember that on another occasion I heard the sadhu telling some upcountrymen, 'what can you give to me, I have left my father, mother and wife I do not require even a house to live in'" (*ibid, p 232, ll 2-4*)

In cross-examination it seemed to him on looking at the statement that the sadhu had said "I have lost my mother and father what do I care for?" (*Vol 2, p 116, ll 25-26*) One has then only to look at the re-examination on the point

"Q—Did you tell this to Romesh Babu, 'I remember that on another occasion, I heard the sadhu telling some upcountrymen, 'what can you give to me, I have left my father, mother and wife I do not require even a house to live in'?" (*Objected to*)

A—Yes, I remember, there was such talk I said so to Romesh Babu

Q—And is this true? (*Objected to*)

A—Yes

Q—You have said to-day that he (the plaintiff) said—‘I have neither father nor mother, what do I care for?’ You have said this from your present impression? (*Objected to*)

A—It is a mistake on my part. I had no recollection. On looking at the additional statement of *Ex A*, I remember that what I stated there was true” (*ibid*, p 121, ll 11-23)

The answer he gave in cross-examination that the sadhu had said he had lost his parents—not that he had left them, as was the original statement of the witness to R C Datta,—would undoubtedly have suited the defendants better, as it would have been consistent with the report which the defendants got from Surendra Kumar Chakrabarty (*D W 408, Vol 17, pp 268-288*) only a few days after Debabrata Mukherjee’s examination by R C Datta, regarding the identity of the plaintiff as Sunder Das alias Mal Singh of Aujla. Debabrata Mukherjee gave his statement on the 26th May, 1921, and Surendra Kumar Chakrabarty made his report a month later on the 27th June, 1921, purporting to have traced out the antecedents of the sadhu and setting out the information he had gathered from the *Guru Bawa Dharam Das* regarding Sunder Das. “Sunder Das has not got his parents alive” (*Ex Z(347), Vol II, p 330, l 14*), or as is put in the English translation of the same report which Needham sent to Lindsay on the 2nd July, 1921, (*Ex 338, Vol II, p 334, l 4*) “Sunder Das’ parents are not alive”

Can there be any wonder after this that by his evidence Debabrata Mukherjee invited a comment like the one made by the learned judge about him? It will be observed that his former statement was put to him in examination-in-chief,—though it is difficult to see how the Commissioner could allow it to go in under the provisions of s 157 or s 159 of the Evidence Act, either to corroborate the witness or to refresh his memory (*Vol 18, p 63, ll 26-28*),—and it was only after the contradiction came out in cross-examination that the defendants’ advocate sought to repair the mischief by himself suggesting to the witness in re-examination,—and that, he it noted, with doubtful legality,—“You have said this from your present impression?” The witness was not slow to take the hint, and tried to explain it away by saying that it was a mistake on his part he had no recollection. It will be seen, however, that he had looked at his original statement before he gave his answer in cross-examination (*Vol 2, p 116, ll 25-26*)

Say what Mr Chaudhuri may, none of the witnesses of the Maitra group can be even remotely accused of having betrayed such a lamentable lapse or confusion of memory

THEORY OF PREMATURE REPORT OF DEATH

One can appreciate Mr Chaudhuri’s difficulty in trying to discount the evidence of these witnesses without impeaching their credit, but the suggestion which he next makes to this end leaves one wondering whether he means to be taken seriously. It is to the effect that there might have been a premature report of the Kumar’s death sent to the Sanitarium on the 8th evening, and that the witnesses were possibly mixing up their recollection of such a report with the fact of men being called the next morning for the cremation. We know in our own experience, said learned counsel, that it has often happened, when a man is not actually dead he has been reported to have died, and so he was willing to concede for the sake of this batch of witnesses it might have happened in the present case. The difficulty,

however, in his way is that apart from its improbability, such a suggestion was specifically denied by his own witnesses Satyendranath Banerjee and Dr Ashutosh Das Gupta

At a much earlier stage, as complainant in the Defamation Case, it was no doubt Dr Ashutosh Das Gupta's instruction to his pleader to put this case to the defence witnesses, as is evident from the answer given by one such witness Surendra Chandra Roy Chowdhury in the course of his cross-examination in that trial. The answer is quoted by Dr Das Gupta from the deposition of the witness which was shown to him during his own cross-examination in the present case, and is to this effect, as he himself reads it

"(Shown passage in the deposition of Surendra Roy Chowdhury)

I read 'He (that is, the messenger who came to the Sanitarium) did not say the Kumar is dying. He gave out the Kumar is dead' " (Vol 16, p 323, ll 23-25)

Dr Das Gupta, however, definitely resiled from this case in his present evidence,—though no doubt in a most unconvincing manner. In cross-examination he first admitted that it was he who had given instructions to his pleader in the criminal trial regarding the events at Darjeeling (*ibid*, p 323, ll 16-18), but pretended not to remember having ever heard of Surendra Roy Chowdhury—not even when he was reminded of the evidence of this witness in the Defamation Case as to messengers having come to the Sanitarium after dusk to call people for the cremation (*ibid*, ll 19-22). Then when he was shown the passage from the deposition, he unblushingly said that he had not given "this particular instruction" to his pleader (*ibid*, ll 33-35), and on the following day, withdrew his previous admission completely

"I want to withdraw my statement on the first day of my cross-examination that I gave instructions for the cross-examination of defence witnesses" (*ibid*, p 336, ll 1-3)

It may be perhaps interesting to note the characteristic equivocation which he then indulged in

"Q—Do you want to withdraw your statement that you instructed Akhoy Babu about Darjeeling incidents?

A—No

Q—You also said that in the Defamation Case you instructed your pleaders about Darjeeling incidents and that no body else did so in your presence, and that you did not want to suggest any body else did so. Do you want to withdraw that?

A—No, but some might have done so—I do not say this was done in my presence. I do not suggest that my pleader in the Defamation Case was improperly influenced by the opposite party (*objected to*). I cannot say who else besides myself could possibly have instructed my pleader about Darjeeling incidents" (*ibid*, p 336, ll 4-16)

However unsatisfactory it may be, the fact remains that Dr Ashutosh Das Gupta now definitely refuses to adhere to the case he must have previously made

Satyendra does not suffer from the handicap of an earlier statement, and he would naturally not think of any such case. His statement is quite definite

"It is impossible that any body could go to the Sanitarium at dusk to say that the Kumar was dead, and would gentlemen come to take him for cremation? The Kumar was not dead"

(Vol 16, p 495, ll 11-13)

The theory of a premature death report, like the other grounds advanced by Mr Chaudhuri to discredit the evidence of the Maitra group, must consequently fail

SUPPOSED SUPPORT OF DEFENCE CASE BY MAITRA GROUP

(iii) Mr Chaudhuri's final submission regarding this body of evidence is that it is really helpful to the defence, and he puts his argument in this way if any thing unusual had happened about the alleged evening cremation, these witnesses were bound to have heard about it and remembered it, but none of them say so, on the other hand, they admit that they never heard during their stay at Darjeeling that the Kumar had not died or that he had not been cremated

Principal Maitra was asked in cross-examination—"Did you hear the next day that the second Kumar was cremated that day with a full show of ceremony after a procession"? He answered—"No No, so far as I remember Not the next day" (*Vol 8, p 13, ¶ 24-26*) Then, again, he said to court—"I had no reason to believe that the Kumar was not dead during my stay at Darjeeling" (*ibid, p 16, ¶ 7-8*)

Radha Kumud Mukherjee heard of the supposed return of the Kumar after death only from press reports a few months before he gave his evidence,, showing that he could not have heard any thing during his stay at Darjeeling which might lead him to suspect that the Kumar had not died. (*Vol 9, p 437, ¶ 30-37*)

Hiralal Roy says quite plainly that he had no reason to believe during his visit to Darjeeling that the body had not been cremated or that the Kumar was not dead, and had no idea that the condolence meeting was a faked meeting (*Vol 9, p 440, ¶ 20-25*)

Nagendra Nath Rakshit admits the condolence meeting, but cannot recall any thing else he had heard about the Kumar at Darjeeling (*Vol 12, p 11, ¶ 11-13*)

Admittedly these witnesses all stayed at Darjeeling for some time after the condolence meeting, and their evidence undoubtedly establishes the fact that so long as they were there, they heard nothing which might raise any doubt in their minds that the Kumar had not died, or that his body had not been cremated. It seems to me, however, to be going too far to draw from this a definite conclusion adverse to the plaintiff, and as necessarily disproving his case regarding either of these events

STORY OF MISSING BODY IF KNOWN AT SANITARIUM

It need not be disputed that the story of the missing body must have reached the Sanitarium, if not the same night, at any rate on the day following. Most of the plaintiff's witnesses who speak about people from the Sanitarium having gone to the cremation ground no doubt say that these persons did not wait there long enough to have witnessed all the strange happenings of that night, but there is also evidence to the effect that some of the Sanitarium party returned the same evening with the news that the body could not be cremated on account of rain and storm

Thus, Padmini Mohon Neogy, P W 655, the only witness on the plaintiff's side to have gone to the cremation from the Sanitarium, says that he was one of a party of 7 or 8 who went (Vol 8, p 249, ll 29-30), but according to him, they all came back almost immediately after reaching the *सान*, as the weather was threatening (*ibid*, 249, ll 36-37, p 250, ll 16-17 and p 251, ll 22-23). To the same effect is the evidence of Manmatha Nath Chowdhury, P W 986, (Vol 11, pp 276-283), another witness of the evening cremation, though not of the Sanitarium, who has a special reason for remembering the fact of his going (*ibid*, p 276, ll 36-39) and who says that a batch of 5 or 6 people went from the Sanitarium, but that they left the *सान* directly after they got there (*ibid*, p 280, ll 32-33, p 283, ll 27-30), he himself leaving a few minutes later (*ibid*, p 280, ll 23-25 and ll 34-35). Sitanta Kumar Bagchi, again, who also attended the evening cremation (Vol 2, pp 433-467), admits that several persons from the Sanitarium joined the procession (*ibid*, p 435, ll 9-10, and p 450, ll 16-21), but does not say that any of this party stayed at the cremation ground till the end, or at any rate, till the body was missed. Indra Shing Satri, P W 963, similarly says that "some Babus of the Sanitarium" got into the procession (Vol 11, p 50, l 2), but gives no indication how long they remained at the *सान*. By the way, according to this witness, these men joined the procession *en route*, as is stated also by Sitanta Kumar Bagchi (Vol 2, p 450, ll 18-20), though Manmatha Nath Chowdhury says, they joined from "Step Aside" (Vol 11, p 280, ll 36-37), not in my opinion such a material discrepancy as should discredit the evidence.

On the other hand, there is Surendra Chandra Roy Chowdhury who says that the Sanitarium party returned the same night, and one of them brought the report to the Common Room, while the witness was still there "chit-chatting" with his friends after dinner, that the body could not be cremated "on account of excessive rain and storm" (Vol 2, p 470, ll 19-30). Asked about the time in cross-examination, he stated, "It might have been 10 or 11 o'clock in the night, it might have been an hour more or less" (*ibid*, p 477, ll 14-15), but the night was "much advanced" (*ibid*, l 21). He made it clear, however, that it was on the next day that he heard about the missing of the body—from Prof Benoy Kumar Sarkar (*ibid*, p 471, ll 11-13 and p 474, ll 36-37).

MIGHT STILL CREATE NO SUSPICION

Assuming, therefore, that the story of the failure of the evening cremation was known at the Sanitarium, the question still is whether the mere fact that a messenger or messengers came round to call men again the following morning and some persons actually went over and attended the morning cremation, was bound to raise any suspicion regarding death or cremation. A strange occurrence like the sudden missing of a dead body from the cremation ground might undoubtedly set people asking questions about it, but there might still conceivably be circumstances present which would silence such questions. In the first place, there would be at that stage no occasion for suspecting foul play. Secondly, if there was heavy storm and rain that night, as is the plaintiff's case, there was the chance of the body having been blown over and hurled down the hill-side, and then retrieved by the Kumar's people after a long and laborious search and after other members of the cremation party, naturally not so interested, had left. Thirdly, there would be the fact of the morning cremation itself,

carried out with due pomp and publicity, to dispel the remotest trace of any doubt that the Kumar had not been cremated. And lastly, any possible suspicion would be put out of the question by the fact that the Kumar's party quietly departed from Darjeeling the next day, apparently satisfied that they had duly performed their last duty to their deceased master and relative.

Supposing there was a *contre-temps*, if the family were satisfied who would be others to question? Principal Maatra was asked in examination-in-chief

"Q—Did you hear next morning as to how those who had gone with the body to the cremation ground had fared?"

A—I did next day, but whether in the morning or in the afternoon, I am not quite sure—probably in the morning I heard it in front of the Superintendent's quarters at the Sanitarium" (*Vol 8, p 13, ll 1-5*)

Taking this along with his answer in cross-examination that he had no reason during his stay at Darjeeling to believe that the Kumar was not dead, it is evident that whatever the witness might have heard the next day, and however strange it might have appeared to be, it could not have been anything so unnatural or unaccountable as to excite any suspicion regarding the death of the Kumar or the genuineness of the cremation.

Weighing the pros and cons very carefully, I have no hesitation in holding that the evidence of Prof Maatra and the other witnesses of this group remains wholly unshaken, and as I have indicated before, this evidence, if accepted, undoubtedly carries the plaintiff a long way.

CONCLUSION AS TO HOUR OF "DEATH"

To sum up my conclusion now on the question of the hour of death or supposed death of the second Kumar, I am definitely of opinion, upon a review of the entire evidence, oral and documentary, and on a consideration of the probabilities of the case, that Mr Chandhuri's attempt to displace the finding of the learned trial judge has totally failed, and the defendants' case that death occurred at about midnight must be held to have been completely negatived. In arriving at his finding, it will be seen the learned judge has nowhere even remotely imported the question of identity into the discussion, but has based it entirely on an independent examination of the evidence.

It is hardly necessary to emphasise once again the importance of the issue regarding the hour of death or supposed death. By showing that the event occurred in the evening the plaintiff does not necessarily destroy the defendants' case of a morning cremation, for the body might still have been taken out for cremation in the morning, but "death" at dusk is undoubtedly the touch-stone of his own case regarding the evening cremation. It is from this point of view that the defendants so strenuously insist on death at midnight as falsifying *ipso facto* the plaintiff's story of a cremation in the evening.

It is perhaps worth while recalling that the defendants' first attempt to get rid of a night cremation was by imputing death at midnight to the plaintiff himself as a part of his story. As appears from the "story of the sadhu" which was circulated with the questionnaire framed in 1921 at an

early stage of the Lindsay enquiry (*Ex 443, Vol II, pp 239-240*), the version which was then put into the mouth of the plaintiff was that of death at midnight followed by an attempted cremation during the night which was spoilt by rain and storm. The witnesses were being asked about incidents which had happened 12 years ago, and it was probably considered safer to avoid taking any risks by stirring up memory with the alternative of death at dusk as the plaintiff's case, which might conceivably lead it away from a morning cremation. The suggestion of death at midnight, on the other hand, with the attendant improbability of a cremation thereafter in the course of the night, might easily be expected to guide the memory almost involuntarily to a morning cremation as the more likely event (See the observations of the learned judge, *Vol 18, p 318, ll 1-6*)

4 ALLEGED CREMATION PROCESSION IN THE EVENING

"Death" at dusk being thus established, I may now pass on to consider the question of the evening cremation which is the next topic in the Darjeeling chapter. This necessarily involves an examination of the circumstances which are said to have occasioned a failure of that cremation. The admitted existence of a morning cremation is also a factor which it is impossible to leave out of account in dealing with this matter, but, as I have endeavoured to explain before, it does not mean that unless the plaintiff is able affirmatively to prove that the body taken out in the morning was not that of the second Kumar, his case must necessarily fail, though this will undoubtedly be the result, if the defendants on their part succeed in establishing the contrary.

ALL RELEVANT FACTORS CONSIDERED

The learned judge, in my opinion, was fully alive to the bearing on the case of the morning cremation, and I do not think that in dealing with the story of the evening cremation and its alleged sequel, he failed to weigh the plaintiff's evidence against the facts and circumstances alleged by the defendants. The acceptance of the plaintiff's story, coupled with the admitted fact of a morning cremation, no doubt carries with it the implication of a substituted dead body having been passed off as that of the second Kumar, but while the apparent absurdity or improbability involved in such an assumption is undoubtedly a factor which must be taken into account, it would still, in my judgment, be moving in a vicious circle to make this a ground for rejecting out of hand the substantive evidence on the side of the plaintiff, if it is otherwise acceptable, and accepting, on the other hand, without question the defendants' evidence, as if it must necessarily be true.

There is no inherent improbability in the story of the body being taken out to the burning ground before midnight, nor in that of a sudden burst of rain and storm dispersing the cremation party in all directions, leaving the body on the cot in which it was carried. The sequel which is said to have followed,—the missing of the body by the men when they returned after the rain and storm had subsided, and the failure to cremate the body,—is undoubtedly a strange development, of which the evidence must be subjected to close scrutiny, but it will not be right to reject it on *a priori* grounds, or because the defendants have a simpler and more natural story

of cremation to tell Incredible as this part of the plaintiff's story may seem to be on the face of it,—and the learned judge says "it sounds like a tale" (*Vol 18, p 366, l 20*),—there will still be no reason to disbelieve the witnesses who speak to it, if the evidence which they give is consistent, as it stands, and fits in with other facts independently established

The first question that requires to be considered is whether a funeral procession was taken out from "Step Aside" to the cremation ground on the evening of the 8th May,—no matter at what precise hour this was done, provided it left the house well before midnight

THEORY OF "BASHI MARA"

Mr Chaudhuri finds fault with the learned judge because before dealing with the direct evidence on the point, the latter expresses the view that if the Kumar's apparent death occurred between 7 and 8 P M, it is almost inconceivable that the body should not have been taken out to the burning ground in the course of the night (*Vol 18, p 364, ll 11-13*). The reason which the learned judge gives in support of this is the well-known Hindu custom which forbids a delayed cremation, or *bashi mara*, as it is popularly known (*bashi* meaning stale and *marā* a corpse),— a custom which, the plaintiff proves by authoritative evidence coming from a Hindu pundit versed in the shastras, P W 1022, Sriram Shastri, who says, quoting a text in support of his statement, that if death occurs in the course of the night, shastric injunction and usage require the body to be cremated before dawn if this is not done, the corpse (*marā*) becomes *bashi* (stale), and sin is incurred (*Vol 12, p 14, ll 3-7*). Dr Ashutosh Das Gupta, D W 165, also testified to this custom in a former deposition, and though he tries to go back upon it, he has still to concede it to a certain extent in his present evidence (*Vol 16, p 311, ll 17-22*). Mr Chaudhuri, however, ridicules the idea, and says that at a place like Darjeeling, even if death occurred early in the evening, not to speak of midnight, the natural and more reasonable course would be to wait till the next morning for the funeral, and he argues accordingly that the learned judge's view is wholly against probabilities

SUPPORTED BY DEFENDANTS' OWN EVIDENCE

Mr Chaudhuri's object evidently is to destroy the plaintiff's story of an evening cremation, but he might do worse than apply the test which he is setting up to the evidence on his own side, which unmistakably goes to show that Satyendra Nath Banerjee himself sent for men for the funeral in the course of the night, though according to him death took place at midnight. This is in fact supported by the entry in his own diary under date the 8th May, to which reference has already been made more than once "Sent man to the Sanitarium for men to get the corpse removed for funeral" (*Vol 1, p 306, ll 13-14*). It cannot possibly mean that he was sending word all round to get men for a morning cremation. In his present evidence he no doubt did his best to fall into line with his learned counsel, with the suggestion that he was sending out "chits" merely to convey the news of death, and not to collect men for the actual funeral, but I have no

hesitation in saying that this was a palpable falsehood on the face of it. Here is what he said

"Q—Do you suggest you sent him (i.e., a messenger) at the time to the Sanitarium for men to come and take the corpse of the Kumar to the cremation ground?

A—No, I only sent a chit to give information—I did not want them to come at night—it depended on them" (*Vol 16, p 478, ll 28-29*)

The answer was so disingenuous that the next question which Mr Chatterjee put was perhaps inevitable

"Q—Your power of masking reality had not reached perfection when you wrote this (shown the entry)?

A—I never masked reality

Q—You did write this?

A—Yes" (*ibid, p 478, ll 30-34*)

If the witness was not "masking reality" then, somebody else must be doing so now on his behalf

Satyendra is falsified not only by his diary, but by the evidence of Rajendra Nath Sett, Tinkari Mukherjee, Shyamadas Banerjee and Durga Charan Pal,—Rajendra Nath Sett and Shyamadas Banerjee actually giving the words of the note they are supposed to have received from him "Dear Mr Sett, Kumar is no more, please come with Brahmuns for the last rites" (*Vol. 1, p 301, ll 6-7*), and "Kumar expired, come with Brahmuns for last rites" (*Vol 1, p 269, ll 9-10*)

There is the further evidence of another defence witness, Mahendra Nath Banerjee.

"Lall Behari Mukherjee was a fellow worker of ours. He said to me, 'Shyamadas Babu has told us that the second Kumar of Bhowal is dead and that we shall have to go to cremate him' I said 'I shall not be able to go at such a late hour of the night'" (*Vol 1, p 323, ll. 24-29*).

EVIDENCE OF KALI DAS PAL

Reference may also be made in this connection to the evidence of Kali Das Pal, a witness on behalf of the plaintiff, which Mr Chaudhuri himself accepts, except that he says that the witness was making a mistake about the time when he is supposed to have received the news of death. Kali Das Pal was an assistant in the Chief Secretary's office in the Bengal Secretariat and was staying at the Old Cutchery Building in Darjeeling. This is what he says—

"Men on behalf of the Kumar came and gave us the death report about the second Kumar and asked the Brahmuns to carry the dead body to the cremation ground

"Q—What were you doing then?

A.—At that time we sat to our dinner

Q—At what time?

A—At 9 or half past 9, it would be thereabout At 9 or half past 9 at night I did not go

Q—You have stated that you did not go on their call Why did you not go?

A—All of my friends said 'It is absolutely impossible to go to the cremation ground in this hour of the night Please come tomorrow morning' " (Vol 2, p 127, ll 26-34 and p 128, ll 12-16)

Mr Chaudhuri in fact relies upon the statement made by this witness that nobody would or did go from the Cutchery Building at that late hour of the night, for the purpose of showing that the news of death had been received late It will be seen, however, that the witness makes it quite clear that Brahmans were wanted to carry the dead body to the cremation ground during the night

After all, therefore, the suggestion that if the Kumar "died" early in the evening, his body was taken out for cremation shortly thereafter, is not so absurd or preposterous, as Mr Chaudhuri would have it, forgetful of the evidence of his own witnesses An attempt would undoubtedly be made at once to collect men for the purpose, and if a funeral procession did not go out, it would be only because a sufficient number of men failed to turn up, but the evidence is all the other way

If the learned judge referred to the prejudice against "*bashu maa*", it is not to be supposed for a moment that he rested his finding on the question of the evening cremation or of its failure solely on this basis, or that, as Mr Chaudhuri would like to put it, he proceeded on the footing that given death at dusk, all else must inevitably follow Such a line of reasoning would be so obviously fallacious that the learned judge might well have been spared the accusation of having perpetrated anything so absurd or ridiculous

PLAINTIFF'S POSITIVE EVIDENCE OF EVENING PROCESSION

Mr Chaudhuri admits that there are witnesses on the plaintiff's side who speak to having attended or seen the evening procession or heard of it, but contends that the learned judge has not only not discussed this evidence on its merits, but has said that he will not do so, and he complains that the learned judge merely gives the numbers of certain witnesses, regardless of whether their evidence is purely hearsay, or whether it is mutually destructive, or whether it bears patent marks of falsehood The criticisms seem to me to have very little substance in them

There are at least seven witnesses who say they attended the procession, namely, Padmuni Mohon Neogy, P W 655 (Vol 8, pp 249-255), Sitanta Kumar Bagchi (on commission) (Vol 2, pp 433-457), Kiron Chandra Mustafi, P W 941 (Vol 10, pp 383-385), Bisweswar Mukherjee, P W 944 (Vol 10, pp 394-399), Jatindra Chandra Chakraverty, P W 947 (Vol 10, pp 418-424), Manmatha Nath Chowdhury, P W 986 (Vol 11, pp 276-283), and Chandra Singh, P W 968 (Vol 11, pp 84-94) The learned judge refers to all these

witnesses in his judgment (*Vol 18, pp 364-366*), and singles out two of them for special mention, Padmini Mohon Neogy and the hill-man Chandra Singh, specially remarking on the demeanour of the former in these words. "his manner impressed me as that of a truthful man" (*ibid, p 365, ll 9-10*)—an opinion which, speaking for myself, sitting in appeal I see no reason whatever to disregard

PADMINI MOHON NEOGY

I have had occasion already to consider the evidence of Padmini Mohon Neogy, and in my judgment that evidence remains wholly unshaken by cross-examination, or by any comments which Mr Chaudhuri has advanced before us. In judging the credibility of this witness I refuse to be guided by the opinion which Satyendra chose to express about him

Q—Do you say Mr Neogy has perjured himself by deposing here that he went out of the "Step Aside" on the 8th evening with the procession carrying the body of the second Kumar?

A—He has most deliberately perjured himself
I have heard he deposed in the Defamation Case to this effect falsely I did not know that his statement was taken by an officer of the Board of Revenue

Q—Do you suggest that he has departed from the statement he had made on that occasion? (*Objected to*)

A—I do not know I say that his statement that information was sent of second Kumar's death to the Sanitarium on the evening is false" (*Vol 16, p 479, ll 1-12*)

ALLEGED INCONSISTENCY WITH PREVIOUS STATEMENTS

As I have shown before, his present evidence is substantially the same as in the Defamation Case in which he was a witness for the defence, otherwise, Mr Chaudhuri would most assuredly have put in his deposition under s 155 of the Indian Evidence Act for the purpose of contradicting him. The supposed discrepancy, which Mr Chaudhuri makes much of, is as regards the time when the witness had received the news of death at the Sanitarium, or reached "Step Aside", or returned from the cremation ground, but this in my opinion is not a real contradiction at all. He was asked if he remembered the timings he had mentioned on the former occasion, and he said "I do, roughly", (*Vol 8, p 250, ll 33-37*), and on it being put to him then that he had stated that he had reached "Step Aside" at about 7-30 P M, he answered "I may have, but I do not remember"

Q—If you said so, that was correct?

A—Must be substantially correct—not counting difference of 10 or 20 minutes" (*ibid, p 251, ll 5-11*)

To a suggestion that he must have reached the cremation ground at 8-30, having regard to his evidence, that is to say, his former evidence, he replied "May be that, or a few minutes this side or that" (*ibid, ll 16-18*)

On his answers it is more than doubtful if his former statement is substantive evidence in the case. His present evidence clearly is that he received the news of death "at dusk" (*ibid*, p 249, l 27), by which he explains he means "candle light", which in May would be 7-30 or 7-45 at Darjeeling (*ibid*, p 251, ll 1-2). Mr Chandhuri would, however, for his purpose discard these timings, and fasten on those which the witness is supposed to have given in the Defamation Case.

I should like to repeat once again, having regard to the long lapse of time after which the witnesses were deposing, that it would be wholly wrong to try and discredit them by a rigid application of the time-test, if I might so put it.

Mr Chaudhuri took the trouble to work out a time-chart on the evidence of the plaintiff's witnesses of the evening cremation, in order to bring out the conflicting nature of their statements as between themselves, or in the case of some of them, between their present and previous depositions. This chart was, however, prepared on the basis that Padmini Mohon Neogy said that he had seen the procession start from "Step Aside" at 7-30 P.M., but as pointed out above, this is not his statement now, and it would be hardly fair to pin him down to it with meticulous strictness. Taking his present evidence, the inconsistencies indicated by Mr Chandhuri such as they are, seem to me to be of a trivial character and of little or no consequence whatever.

Padmini Mohon Neogy had also given a statement to R. C. Datta in the course of the Landsay enquiry (*Vol 8*, p 250, ll 16-20). But this was not put to him, showing clearly that it was not possible to detect even an apparent inconsistency therein. The only suggestion in cross-examination was that six days before he had made a statement to some one on behalf of the plaintiff (*ibid*, p 254, ll 33-34), which the witness admitted, except that he did not remember whether it was before or after his statement to R. C. Datta (*ibid*, p 254, ll 23-26 and l 35).

OTHER GROUNDS OF ATTACK

Another ground on which it is sought to discredit the witness is that he was not a Brahmin, but still went to the funeral (*ibid*, p 254, l 3). It will be seen, however, that he did not go unasked, like the defendant's witness, D. W. 246, T. P. Banerjee (*Vol 17*, p 347, ll 6-7), but because, as he says, the messenger who came to the Sanitarium wanted men to help at the cremation (*Vol 8*, p 249, ll 28-31). He was not a Brahmin, but understood that *bhadralogs* (respectable persons) would do, as enough Brahmins might not be available (*ibid*, p 254, ll 3-4). Mr Chandhuri's own witness Shyamadas Banerjee admits that "if any one dies at Darjeeling, people of all classes would attend", his evidence being that he took the permission of the Financial Secretary to allow all clerks, and not merely the Brahmins among them, to attend the Kumar's funeral (*Vol 1*, p 256, ll 33-36). A further reason which Padmini Mohan Neogy gives for having gone to the cremation is that he "expected a grand feast, the deceased being a big man" (*Vol 8*, p 254, l 5). This appears to learned counsel to be an "extraordinary" story, but a feast to pall-bearers and others who attend a cremation at the end of the period of mourning, is a well known and established custom amongst Hindus, and it is Mr Chaudhuri's own case that Bara Kumar sent a sum of Rs 300/- to Rajendra Nath Sett at the Sanitarium for feeding the "*savan bandhus*", as such persons are called (*Vol 1*, p 303, ll 7-8). See also what his own witness Shyamadas Banerjee said: "Those who carry the dead body on their shoulders

have to be fed in this our part of the country on the 11th day after death" (Vol 1, p 258, ll 36-38)

The last point urged against the witness is that though he was a sub-editor of the "Bengalee", he did not send a contradiction of the obituary notice of the second Kumar which had appeared in that paper, stating midnight as the hour of death (*Ex Z* (245), Vol 1, p 443), but there is no reason to disbelieve his definite statement that he had not read that report (Vol 8, p 252, ll 35-36), though he did not deny that he might have been receiving a copy of the newspaper every day at Darjeeling (*ibid*, p 254, ll 40-42). He was at the time on leave, as he informed the court (*ibid*, p 255, l 1)

Like the Matra group of witness, Padmini Mohan Neogy stated quite frankly that during the 10 or 12 days that he stayed at Darjeeling after the incident spoken to by him he had no reason to believe that the Kumar had not died or that he had not been cremated. He did not come to know of any funeral procession the next morning either, nor did he remember any condolence meeting at the Sanitarium (*ibid*, p 252, ll 11-17)

A WITNESS OF TRUTH

I have no doubt in my mind that Padmini Mohan Neogy is a witness of truth, and in my opinion his testimony alone should be sufficient to prove the fact of the evening procession. He is not a witness of the happenings at the *sasan*, of which the evidence comes from the other witnesses whom I have already named. So far as the fact of the procession is concerned, their evidence is only superfluous corroboration, as is also that of the other witnesses examined by the plaintiff, being persons who saw the procession pass or heard about it.

It is only as regards the last categories of witnesses, and not of those who accompanied the procession to the cremation ground, that the learned judge says "I do not propose to give their evidence in detail. They would not be believed if death at dusk was not a fact, and if that was a fact, there would be no reason to disbelieve them" (Vol 18, p 366, ll 36-37). As I understand it, this only means that the learned judge would not be prepared to accept the testimony of these witnesses for the purpose of proving death at dusk, but once that fact is established by independent evidence, as in his opinion it has been, he sees no reason to disbelieve their story about having seen or heard of a funeral procession in the evening. In other words, he accepts that story, because it is confirmed by death at dusk, which has been proved *akunde*—not that he deduces the fact of an evening cremation from death at dusk as a necessary corollary. To put the matter in another way, it is not a case of believing a witness without testing his evidence, but of accepting it only after it has passed the crucial test, namely, that of being consistent with death at dusk.

OTHER WITNESSES

The learned judge has referred to some of these witnesses in his judgment. Khan Sahib Nasiruddin Ahmad, P W 1023 (Vol 12, pp 17-20), Ranjit Singh, P W 940 (Vol 10, pp 379-382), Indra Sing Satri, P W 963 (Vol 11, pp 49-52), Dhanjit, P W 966 (Vol 11, pp 61-64), Lal Chand, P W 978 (Vol 11,

pp 237-240), Mahammad Ashraf Alam, P W 980 (*Vol 11, pp 246-251*), and Santa Bir Sing, P W 983 (*Vol 11, pp 259-263*) To this list might be added the names of Kedar Nath Pande, P W 981 (*Vol 11, pp 252-254*), Ginja Bhusan Roy, P W 994 (*Vol 11, pp 433-442*), and Mahammad Abdul Sattar, P W 1025 (*Vol 12, pp 24-26*)

In view of Mr Chaudhuri's criticisms, the evidence of these witnesses may be briefly adverted to

Khan Sahib Nasiruddin Ahmad (Vol 12, pp 17-20)

An old man of 70, with an annual income of Rs 5,000/- from landed properties—a man of substance for an Indian, as the learned judge says was some time a Commissioner of Darjeeling Municipality, and for long a resident of Darjeeling Heard the news of death at 7-30 P M at the bazar on his way home from the Cntchery Also saw the procession from his house in Ferndale Road at 9 or 9-30 P M, going along with cries of "haribol" (p 18, ll 2-5) Speaks about the weather "at about 10 P M rain fell, it began with wind, and later on, the wind ceased, but the rain continued" (p 18, ll 6-7) Elaborates in cross-examination "it was not actually raining then, but it looked as if it was going to About an hour after, the rain and wind came It was like *tufan* The wind like *tufan* continued about half an hour and then ceased, but the rain continued The rain that continued was heavy, but less heavy than before" (p 19, ll 4-10) Saw also another funeral procession the next morning at 8 or 9 A M and was told it was that of the Kumar

The main criticism is about the story of rain and storm said to be a tutored story to corroborate Darsan Das *alias* Gopal Das, the rescuing sadhu, P W 991, so that the wind dropping, the sadhus could hear the sounds from the supposed corpse (*Vol 11, p 382, ll 11-15 and p 400, ll 15-20*) according to Mr Chaudhuri, an apt illustration of "corroboration's crafty aid", said to be a special feature of the plaintiff's case A clever taunt no doubt, but Darsan Das needs no such aid, crafty or otherwise, for his story, for he stands on much surer ground of his own The details which are supposed to supply the corroboration are only elicited by Mr Chaudhuri himself The story as given in examination-in-chief that the rain continued after the storm had abated is not a new one, but was given by other witnesses examined before Darsan Das See, for instance, Kiron Chandra Mustafi, P W 941 "in that shed we waited for an hour, more or less, and then the rain abated and the storm was gone" (*Vol 10, p 385, ll 5-6*), Laksmi Chand, P W 979 "it was a heavy shower with high wind and lasted 1 or 1½ hours After that only slight rain continued to fall" (*Vol 11, p 243, ll 20-21*) In any case, even supposing the witness gave his story as to the wind dropping after half an hour, on being told about Darsan Das's evidence, it may well be that this evidence quite honestly led him to recollect likewise

Ranjit Singh (Vol 10, pp 379-382)

Head Clerk and Accountant of the Darjeeling Club, Ltd (Planters' Club) his father was a Police Inspector and he lived in the Police quarters just above the Railway goods shed Was a lad of 14 in 1909, and would be dancing and singing at a Children's Amusement Club in the Nripendra Narain Hindu Public Hall near the market

Remembers being coached there one evening at a rehearsal in view of an engagement at Kurseong the next day on the occasion of a *sradh* ceremony of the Kakina Raj, when the news of death was brought to the Hall at about 7-30 P M. Saw the procession and heard cries of "haribol" near Chak Bazar at about 10 P M on his way home from the Club. Says that several Bengalee gentlemen left the Hall on receiving the news of death, of whom he remembers the name of Sanjib Lahiri speaks of heavy rain and storm that night mentions the name of the Dancing Master, Jnan Babu, who was Head Clerk of the Executive Engineer's Office, being P W 838, Jnanendra Nath Banerjee (Vol 9, pp 426-431)

Apart from questioning the witness's recollection generally, the particular comment made is that he says in cross-examination that because of the previous night's rain, he found the roads wet next morning, and even the train started slowly, as the lines were slippery (p 382, ll 1-3) obviously an exaggeration, due, it may be, to the manner of putting the question to which this was an answer, but apparently considered by Mr Chaudhuri to be important enough to elicit a contradiction from a subsequent witness, P W 944, Bisweswar Mukherjee (Vol 10, p 398, ll 8-9)

As for his recollecting the incident of that evening, the witness explains that it was because of its connection with the Kakina *sradh*, which was a "large affair" (p 380, ll 18-19 and p 381, l 15)

Did not say, nor was asked, anything about a morning cremation

Andra Shing Satra (Vol 11, pp 49-52)

A *thakadar* who has lived all his life at Darjeeling remembers having gone to the house of Mr Kirby (wrongly printed Curvey), Contractor, one evening in May, 1909 to make up accounts with a view to make payments to mistries on the following day, which was a Sunday. On his way back from there, at about 9 P M, he met a funeral procession at the junction of Rangit Road and *chowasta* was told it was that of a Raja of Dacca, but he forgets the name. Followed the procession along Ferndale Road up to a road called Mudda Road or Las Road (Conservancy Road), where some men from the Sanitarium joined left the procession about one mile away from his house at Rose Bank, beyond the railway station (p 49, l 22 to p 50, l 4 and ll 38-39). Found the weather threatening at *chowasta*, and was overtaken by rain and storm beyond the Victoria Falls, which he says by guess lasted 4 or 5 hours (p 50, ll 5-6 and ll 33-37). Speaks of a *ghora* between the old and the new *sasan* (p 50, ll 9-10); and, in cross-examination, about a narrow zigzag road from the old to the new *sasan* not wide enough for two to go abreast (p 51, ll 10-12)—now admitted to be a fact.

There is nothing to discredit the witness, and the only point in cross-examination is as to how he came to be called to give evidence for the plaintiff: he admits that he was paid his travelling expenses (p 51, ll 19-36)

Dhanjst (Vol 11, pp 61-64)

A dealer in horses and a permanent resident of Darjeeling. Speaks to having seen a procession one evening after 8 P M passing along

the road (Lloyd Road) as he stood near Pasan Buildings, where he had his stables

One Upen Babu, a clerk of the Municipal Office, who was in the procession, asked him to send four ponies to the cremation ground to wait at Mr Morgenstein's gate, but the ponies could not be sent on account of rain (p 61, ll 20-34)

Says in cross-examination that it started raining at 10 or 10-30 P M when he had got back home after giving orders for the ponies at the stables. The rain became heavier with a strong wind blowing as he sat down for his meal. Next morning his syces told him that the horses could not be taken to the *sasan* (p 62, ll 15-30). The Pasan Buildings had not been built then, but his stables were on the same site (p 63, ll 2-8). Saw in the procession some Bengalees and hill people, and also the "Raja's Police", who were carrying some baskets.

Mr Chaudhuri points out a contradiction between this last statement and the evidence of Laksmi Chand, P W 979, who says that he saw no coolies, but only 4 or 5 hill men who were servants of the Raja, and who carried only lanterns in their hands (Vol 11, p 243, ll 37-39). But it is hardly of any significance. Another witness, Chandra Singh, P W 968, saw lanterns as well as a bundle being carried in the procession (Vol 11, p 90, ll 14-19).

Another comment is that no other witness speaks of any Upen Babu in the procession, but one Upen Babu is named by P W 994, Girisri Bhushan Roy (Vol 11, p 438, ll 12-13), and P W 968, Chandra Singh (Vol 11, p 93, l 32).

It is further pointed out that the witness places the rain at the site of the Pasan Buildings and also at the Judge's Bazar (p 62, ll 32-34), which, it is said, is impossible if the rainfall records are correct.

Says that the Babu who came to ask him to give evidence did not pay his expenses—it was *dharamkabat* (a matter of telling the truth) (p 63, ll 24-26).

This witness too says nothing about the morning cremation, nor is he asked about it.

Lal Chand (Vol 11, pp 237-240)

A betel-seller, who came to Darjeeling in 1901 at the age of 12, and for whom his father opened a *pan* shop in the Cart Road at the Chak Bazar in 1907 or 1908. Saw a procession one evening at about 9-30 or 10 P M, and was told that the corpse was that of the "Raja of Dacca". Half an hour or three quarters of an hour later heavy rain and storm broke out. Next morning at 9 or 10 A M saw again a dead body being carried along in procession, also said to be that of the "Raja of Dacca". Thought it strange, and talked about the matter (p 237, l 20 to p 238, l 9).

The cross-examination, first, was if he had been approached by Atul Roy, which he admitted (p 238, ll 26-27), Atul Roy being plaintiff's *tadbirkar*, but it is not understood how this discredits the witness, seeing that the defendants' witnesses had been similarly seen by their agents. Secondly, his memory was tested by asking

in which year the Maharaja of Cooch Behar or C R Das had died, which he could not give (p 240, ll 2-4) He could not give the year of death of the Kumar either But two processions in respect of the same person might easily fix the incident in his memory

Both this witness and plaintiff's next witness, P W 979, Laksmi Chand, say that they had known each other for 3 or 4 years (p 238, ll 31-32 and p 245, ll 5-6), but as their shops were within 100 yds of each other, Mr Chaudhuri argues, with what logic I cannot understand, that it only shows that one or the other of them must have been a recent arrival at Darjeeling, and therefore, must have been giving false evidence

Mahammad Ashraf Alam (Vol 11, pp 246-251)

A clerk in the Superintending Engineer's Office at Darjeeling and residing there since 1901 a man of Bhagalpur, having a house of his own worth Rs 8,000/- to Rs 10,000/- (p 246, ll 10-15) was living at Darjeeling just below the Railway goods shed (p 250, l 6) Remembers the Kumar of Bhowal coming to Darjeeling in 1909 Made the acquaintance of Sharif Khan, admittedly one of Kumar's staff, who went up with him to Darjeeling Saw the Kumar one day at a shop in Mount Pleasant Road, where Sharif Khan pointed out the Kumar to him was struck by his fair complexion which was like that of an Englishman Saw him again once or twice subsequently near the *chowmasta* Was returning one day from the Lebong races, when coming up to "Step Aside" he heard the sound of weeping entered the house, met Sharif Khan, and heard about the Kumar's death gives the time as 7 or 7-15 P M as lights had been lit near Bhutia Bustee on his way up He scarcely came out of "Step Aside" when he was called back by Sharif Khan, who asked him to show a Bengalee Babu, who was going to the bazar, a shop where funeral requisites could be purchased Took the Babu along to the shop of Amrit Lal Ram Khelaon at Chak Bazar, where he asked the shopkeeper to supply the necessary articles took him then to Kalman Sarder's shop for purchase of firewood An hour or an hour and a quarter later, after he had got back to his house in Ferndale Road, he saw the dead body being borne along, and noticed, among others, Anukul Chatterjee, Sanjib Lahuri and Sharif Khan in the procession About an hour or three quarters after, it started raining heavily, and he retired to bed while it was still raining Did not see any procession the next morning, but heard in the evening that the Kumar's body had disappeared from the *sasan* the previous night (p. 247, l 19 to p 248, l 5)

Mr Chaudhuri attacks the evidence, first, by suggesting that he was giving a false description of Sharif Khan, who, it was said, was not a Punjabi, as stated by the witness, but a man of Gazipur (p 249, ll 11-15) The evidence of true Sharif Khan on the defendants' side comes, however, only from D W 92, Phanu Bhushan Banerjee (Vol 14, p 131, ll 6-8), a witness who is so thoroughly discredited on his own testimony that I for one should refuse to place any reliance on him It is not explained why Sharif Khan could not be produced by the defendants themselves, there being no evidence that he was dead or was otherwise not available

Mr Chaudhuri next suggests that the story that as the witness was going away, Sharif Khan called him and asked where the funeral requisites could be had is "ridiculous", because he was a Mahomedan and was not likely to know what things were required. The criticism itself is ridiculous, because all that he was asked to do was to point out the shop where such things could be had. It may be that the Kumar's people had been making other purchases from these dealers from before, but that does not show that they knew that funeral requisites could also be obtained there. As the witness himself says, "he (the Bengalee Bahu whom he accompanied) did not know that cremation requisites could be had in the shop from which these *saudas came*" (p 249, ll 23-25)

Mr Chaudhuri next points out that the witness saw the procession in Ferndale Road at about 8-30 P M, which, it is said, ought to discredit him. But here again he is taking the timing much too strictly.

The last comment is that he had a talk with Atul Roy several times after the return of the Kumar, 11 or 12 years ago (p 251, ll 2-5), and yet he was not called as a witness in the Defamation Case—a comment which is repeated about several other witnesses, but is wholly futile, seeing that that was not a civil suit, the question of identity was not directly in issue and the present plaintiff was not responsible for all the proceedings on behalf of the defence.

The witness states in cross-examination that when he heard the next day about the missing of the dead body overnight, he did not think it worth while to go and enquire of Sharif Khan (p 250, ll 7-9), but he might not have had any suspicion at the time that a different body had been taken out in the second procession.

Santa Bn Shing (Vol 11, pp 259-263)

Was a Foreman under one Frostmann in 1909. Speaks to having seen and talked to sadhus at the Bazar, and then seen them making their way in the evening towards *sasan*. This was about 4 or 5 years before the last Great War. Heard the cry of "haribol" at 9-30 or 10 P M one Saturday evening, and stepping out of the house in Judge Bazar above Ferndale Road, saw a dead body being carried in a procession. Was told, the Raja of Dacca was dead. Next morning saw another funeral procession at about 8 or 9 A M passing along Lloyd Road. The dead body was covered. Was surprised to hear again that it was that of the Raja of Dacca. Heard 2 or 3 days later that the Raja could not be cremated at night because of storm and rain and that the body had disappeared (p 259, l 24 —p 260, l 18).

Speaks to heavy rain and *tufan* in cross-examination, which left the road in front of his house (Ferndale Road) "washed out", the market and the Cart Road were also wet (p 261, ll 5-20). Did not ask anybody how it happened that the same body was taken out for cremation a second time in the morning (p 261, ll 33-37). Admits having been seen by Atul Roy from whom he gathered he would have to depose (p 262, ll 31-33).

Kedar Nath Pande (Vol 11, pp 252-254)

A priest at the Marwari *thakurbani* at Darjeeling who used to put up at Ram Khelaon's shop (p 252, ll 11-20) Would be out for his duties in the morning from 7 or 8 A.M till midday (p 253, ll 3-4) Speaks to a Bengalee Babu with two or three Hindusthanis and two or three *pahari* coolies coming along to Ram Khelaon's shop one evening at 7-30 or 8 P.M for purchase of cremation requisites About 1 or 1½ hours later, heard cry of "haribol" higher up, and going out, saw a procession with a dead body passing heard it was of the Raja of Dacca, half an hour or so after, it started drizzling, and then raining heavily with *tujan* or high wind (p 252, l 28—p 253, l 2)

His presence at Ram Khelaon's shop to witness the purchases need not have been at a "psychological moment", as Mr Chaudhuri suggests He was putting up with Ram Khelaon and might be expected to be in his shop in the evening As for the other comment that he does not mention Ashraf Alam, though he knew him for 8 or 10 years (p 254, l 6), it only shows he was not tutored, he travelled with him in the same train to Dacca (p 254, ll 8-9), and yet did not name him, because he did not know him in 1909 (p, 254, l 7) He was a priest who did *puja* for the Marwaris in the morning, and so was not finding a mere excuse for not seeing the morning procession, as Mr Chaudhuri would have it

Girja Bhusan Roy (Vol 11, pp 433-442)

His evidence will have to be considered more fully in connection with the story of rescue Speaks to having heard the news of death at about 7 or 8 P.M in Nripendra Narain Hall, then seen the procession near Chak Bazar going towards the Railway godown (p 435, ll 19-30) Speaks also to rain and "a little wind too", before he went to bed (p 436, ll 1-2)

Mahammad Abdul Sattar (Vol 12, pp 24-26)

Since 1932 a Circle Officer of the Patna Court of Wards Estate, in charge of collections amounting Rs 35,000/- Came to Darjeeling at the age of 7 and lived there for 20 or 21 years with his uncle, an employee in the Deputy Commissioner's Office Got a permanent post in that office in 1903, but resigned in 1907 owing to illness Went back to Darjeeling and got employed as Manager in an Oilman's Stores shop till 1912 (p 24, ll 12-27) Not a chance witness who had come to Darjeeling only, 8 or 10 days before, as Mr Chaudhuri suggests Would pass the night at the Stores in Mount Pleasant Road, but take his meals at his uncle's house in Chandmari Remembers having seen a funeral procession one evening in Lloyd's Road at about 9-30 or 9-45 P.M while going for his meal Learned that the body was that of the Kumar of Dacca (p 24, ll 28-36) Speaks to heavy rain and high wind after he reached home, the wind lasting little over half an hour (p 24, l 38—p. 25, l 2) Found fault with because he corroborates Darsan Das regarding the wind dropping (p 25, ll 16-19)

Reference may also be given to the evidence of some of the witnesses who corroborate the story of the purchase of funeral requisites from the shops of Ram Khelaon and Kalman Sarder, as deposed to by Mahammad Ashraf Alam (*supra*)

Laksmi Chand, P W 979 (Vol 11, pp 241-245)

A nephew of Ram Khelaon since dead, who had a big shop at Chak Bazar in Cart Road dealing in groceries and provisions now owns a half share in the business having financed it by putting in Rs 3,000 to Rs 4,000 after his uncle's death in 1931. Also a partner in another shop which paid income-tax Rs 382/- in 1933 (p 241, ll 11-31). Remembers the coming of a big man, the "Rajkumar of Dacca" to "Step Aside" 4 or 5 years before the Great War, and getting his daily supplies of stores from Ram Khelaon's shop where the witness was then employed. Speaks to the visit one evening of Ashraf Munsif (meaning Md Ashraf Alam, P W 980), who came to the shop with a Bengalee Babu and a durwan and 2 or 3 coolies to purchase certain articles required for cremation, which he supplied (p 241, l 32—p 242, l 8). About an hour after, saw a funeral procession, which he was told was that of the Rajkumar. Speaks of heavy rain and storm about an hour thereafter (p 242, ll 9-18). Next morning he went out for payment of bills, and on returning to the shop heard a *halla* (report) about the Kumar not being cremated (p 242, ll 21-25). Speaks of the old *sasan* being in use as well as the new, as the way to the new *sasan* was very bad and jungly before a new road was built about 20 or 22 years ago (p 242, ll 35-40). Has seen *sannyasis* at Darjeeling who would be fed by his uncle (p 243, ll 1-8).

Mr Chaudhuri questions his recollection, but if his evidence is true and there was a *halla* the next morning, as he says, he was likely to remember.

A point is made about this witness and another, P W 964, Durgaprasad Baishy, also an employee of Ram Khelaon's shop (Vol 11, p 55, ll 20-22), that they purposely keep themselves away in the morning lest they might have to speak to the purchase of materials for the day cremation. There is no reason, however, why they should avoid facing any questions about it, seeing that the plaintiff's own witness, Ram Sing Subha, had already stated in examination-in-chief that he had procured fuel from Kalman Sarder's shop and *ghee* from Ram Khelaon's for this cremation (Vol 11, p 66, ll 38-39). It may well be that this purchase of fresh materials in the morning was one of the reasons which led to the *halla* about the failure of the night cremation.

Bhaktabin Roy, P W 988 (Vol 11, pp 292-294)

An old man of 73, who has lived all his life at Darjeeling was an employee in Kalman Sarder's shop from which firewood was purchased for the evening cremation. Gives the time when a Bengalee Babu with three others came for the fuel as 8 or 8-30 P.M., and the year as 1908 or 1909 (p 292, ll 11-28). Speaks to heavy rain at about 10 P.M. (p 292, ll 33-35). Cannot speak without looking up his books of any other big man for whose cremation he supplied fuel (p 293, ll 35-36). Was in the shop the next morning from 6 A.M., as stated in examination-in-chief (p 292, ll 36-37), but still not cross-examined at all about the purchase of fuel for the morning cremation. Found the roads wet and worn out in the morning and some *chhapra* roofs lifted up in some houses (p 293, ll 37-39).

Jang Bir Sinha Karky (on commission) (Vol 11, pp 314-317)

A son of Kalman Sarder since deceased, and an assistant in the Deputy Commissioner's office at Darjeeling was a lad of 14 or 15 years in 1909, and says that he 'was in the shop reading when some people came to buy firewood for the Kumar's funeral in early May that year (p 314, ll 9-36) Did not see any evening procession, but saw one the next morning, which surprised him very much, because the firewood had been taken the previous evening and the body was being taken the next day (p 315, ll 4-14)

The suggestion in cross-examination is that he is one of the group of witnesses who had been procured by Basanta Kumar Mukherjee, P W 823 (Vol 9, pp 383-388), Superintendent in the Deputy Commissioner's Office, Darjeeling

Bhanga Routh (on commission) (Vol 11, pp 334-337)

A *chaprasi* (peon) in the Criminal Court at Darjeeling Speaks to having seen a few coolies bringing firewood to the new *sasan* one evening at about 9-30 P M Had gone there himself with two others in the company of a *sadhubaba*, who was living at the time by the side of the High School above Was told by one of the coolies that the fuel was for the cremation of the Raja of Dacca Shortly after saw a funeral procession approaching, but as it appeared to stop at the old *sasan*, the coolies proceeded with the wood in that direction he and his friends left as it began to rain, and passed the coolies near the *jhora* between the old and the new *sasan* when heavy rain and storm came Near the old *sasan* saw people running away towards the north, lanterns in hand Took shelter in a *mah's* room in the High School compound until the rain abated (p 334, l 10 to p 335, l 12)

The evidence, it is said, should be washed out because he says that he joined his service in 1906 (p 334, ll 10-11), and later in examination-in-chief says "he went to the cremation ground 2 or 3 years before, and not after, he joined service" (p 335, ll 14-15) He was evidently confused, for on the question being repeated "was it before or after you entered into the service?", he answered "it seems to me it was in the year 1909" (p 335, ll 16-18) He is also sought to be discredited as being one of Basanta Kumar Mukherjee's group of witnesses.

If the plaintiff was minded to make a false case, he might easily have sent the cremation articles to the old *sasan*

Apart from these witnesses, there is, as I have already indicated, also the evidence of persons who accompanied the procession to the cremation ground But there can be no doubt that the body of evidence which I have set out, if accepted, fully establishes the fact of the procession Eliminating hearsay, the account which these witnesses give as to having seen the procession is consistent, and not mutually destructive, nor does the cross-examination seem to me to bring out any palpable marks of falsehood

STORY OF RAIN AND STORM

Mr Chandhuri, however, makes two comments of a general character, which in his opinion tend to discredit the evidence of these witnesses as also

of those of the evening cremation itself. One is that they make out a story of heavy rain on the night of the 8th May spread over a wide area all along the Cart Road and both above and below it, of rain at the Bazar, at Chandmani, in Ferndale Road, at the Sanitarium, and in the Bloomfield Tea Estate, down the way to Ghoom, but none of the rainfall records on which the defendants rely show any rain at Darjeeling on or about the 8th. It is pointed out that if there was such extensive rain, as is spoken to by these witnesses, it could not have escaped being recorded at St Joseph's College or at St Paul's, if not in the two disputed registers kept at the Municipal Office and the Botanical Gardens. These rainfall records undoubtedly require consideration, and it will have to be seen how far they can be relied on or held to prevail against the positive testimony of the plaintiff's witnesses.

The second criticism is that most of the witnesses who were called to speak to the evening procession or the evening cremation had not been mentioned by the plaintiff at any earlier stage, which Mr Chaudhuri considers very strange, specially, as he says, there had been at least three investigations into the matter on behalf of the plaintiff prior to the suit, the first by a pleader named Mr Surendra Nath Mukherjee in May or June 1921, the second in the Defamation Case of 1922, and the third in 1925 and 1926 by Mr Dwarka Nath Chakravarti, an eminent vakil of the Calcutta High Court, who for some time acted as one of its judges. The suggestion is that the witnesses were afterwards improperly procured, though there is no trace of any such suggestion put to them in cross-examination.

THREE PREVIOUS ENQUIRIES

As regards the enquiry by Mr Surendra Nath Mukherjee, whom Mr Chaudhuri has been pleased to describe as the "father" of the plaintiff's case, there is no evidence on the record of the nature or extent of it. All that learned counsel is in a position to rely on is a statement contained in a letter of Ranu Satyabhama Devi to J G Drummond, the then Collector of Dacca, dated 29th July 1922, in which she says

"Babu Surendra Nath Mukherjee, B.L., an educated and respectable gentleman of Dacca had gone to Darjeeling and made enquiries about the alleged cremation, and his impression is that the body of my second grandson, Kumar Ramendra Narain Roy, was never cremated" (Ex 274), (Vol II, p 429, ll 9-12)

The enquiries, such as were made at that stage, could not obviously have been exhaustive, nor could they have been made in view of any civil suit.

As regards the Defamation Case, it is pointed out from *Ea J*, the plaintiff's memorial to the Board of Revenue of the 8th December, 1926, that it was sought to prove in that trial that the body of the Kumar was taken to the cremation ground at about 9 P.M. on the 8th May (Vol III, p 98, ll 3-6), but that only two witnesses were examined who said that they had attended the cremation, Padman Mohon Neogy and Joges Chandra Roy, while a third, Surendra Chandra Roy Chowdhury, was called to prove the coming of a messenger to the Sanitarium at dusk to collect men for the funeral, and the return of the Sanitarium party from the *savan* that very night at about 10 P.M. with the report that the body could not be cremated owing to rain and storm (*ibid*, p 98, l 29—p 99, l 11). Thus, in my opinion, cannot rule out the possibility of other witnesses equally competent to give evidence on the point, though not examined in that case. The Defamation Case was not

being tried out on the same scale as the present suit, and it may also well be that all available witnesses had not been or could not have been ascertained at that stage. Further, it would be wrong in any case to identify the plaintiff with the defence in that trial and make him responsible for all its proceedings, merely because the defence received some assistance from his party.

As to the enquiry by Mr Dwarka Nath Chakravarti, Mr Chaudhuri relies on the statement in the annexure to the memorial, *Ex J*, in which this gentleman is said to have held "a thorough enquiry into the matter extending over two years", and examined a number of persons including those who attended the funeral (*Vol III, p 106, ll 17-25*). In the list of such persons appended to the memorial there occur the names of only two of the evening cremation witnesses examined in this case, Surendra Nath Roy Chowdhury (*ibid, p 111, item No 55*) and Padmini Mohon Neogy (*ibid, p 112, item No 39*), and of another person cited but not examined, Sanjib Chandra Lahiri (*ibid, p 112, item No 28*). There is nothing to show, however, that the memorial purported to give an exhaustive list of the persons known to the plaintiff to have gone to the evening cremation or heard about it, or of such persons who had been examined by Mr Dwarka Nath Chakravarti. It is futile, therefore, to ask the court to draw an adverse inference against any of the plaintiff's witnesses from the non-mention of their names in the memorial.

SUGGESTION OF PROCURING FALSE EVIDENCE

Mr Chaudhuri next points out that in the lists of witnesses filed by the plaintiff in the earlier stages of the case in 1930-31 and later, only three names were mentioned—Padmini Mohon Neogy, Joges Chandra Roy and Sanjib Chandra Lahiri, of whom only the first was called, and not the names of the other witnesses who were actually examined in connection with the evening cremation, and he elaborates his point by referring to the manner in which these witnesses came to be produced in the course of the trial.

Sitanta Kumar Bagchi was the first of such witnesses, examined on commission on the 26th June, 1932 (*Vol 2, p 433*), and then came Padmini Mohon Neogy, P W 655, who deposed in court two years later on the 27th June, 1934 (*Vol 8, p 249*), merely proving the procession up to its arrival at the *sasan*.

Evidence as to the happenings at the cremation ground began again with Kiron Chandra Mustafi, P W 941, called on the 26th September, 1934 (*Vol 10, p 383*), who said that he had been approached for the first time to depose in the case only 20 or 25 days before (*ibid, p 385, ll 32*). He gave the names of only two persons in the procession—Nanda Master and Bishu alias Bisweswar—he did not know if the former was still living, but the latter had come to Dacca with him (*ibid, p 383, ll 37-41*).

This Bishu or Bisweswar Mukherji, P W 944, was examined the next day, and said that he had been served with summons at Dacca, and been approached by the plaintiff's agent, Atul Roy, about two months ago (*Vol 10, p 398, ll 13-17*). Among the persons who attended the cremation he mentioned Kiron Mustafi (already examined), Sanjib Lahiri (already cited, though not called), and a boy named Suren Mitra, besides Nanda Master (referred to by Kiron Mustafi) (*ibid, p 395, ll 7-8, 11 and 20-22*). He admits having discussed the points of his evidence with Kiron Mustafi at Dacca (*ibid, p 398, ll 17-19*).

The next witness to follow was Jatindra Chandra Chakravarti, P W 947, called on the 3rd October, 1934. He mentioned the names of his elder brother, Basanta Kumar Chakravarti, Anukul Chatterji, Sasi Babu *alias* Sasi Bhushan Bhattacharji and Fakir Chandra Ray, as well as of Sitanta Kumar Bagchi and Sanjib Lahiri as being among the persons who went to the cremation ground (*Vol 10, p 419, ll 19-20, 23-24 and 36, and p 420, l 13*). He said he had seen the plaintiff some 20 days before, and given a statement to the plaintiff's lawyers three or four days previously. He had not mentioned the fact of his having gone to the cremation to anybody except to the inmates of his house, because he "dared not talk about matters offending a Raja", as he put it (*ibid, p 422, ll 25-31*).

The next witness was Chandra Singh, P W 968, not supposed to have been mentioned by anyone previously. He was called on the 28th November, 1934, that is to say, about two or three weeks after the court reopened at the end of the Puja vacation which commenced that year on the 6th October. He named only Kiron Mustafa as one of the cremation party (*Vol 11, p 91, l 9*), and said that he had been asked by Dr Upen Bose of Kahunpong to come and depose in August or September, but could not do so as he was ill before that nobody had spoken to him on behalf of the plaintiff (*ibid, p 93, ll 32-39*).

The last witness called was Manmatha Nath Chowdhuri, P W 986, examined on the 19th December, 1934, who, again, it is said, had not been named at an earlier stage. He mentioned Bishu Babu (Bisweswar Mukherji, P W 944), Sanjib Lahiri and Jatindra Chakravarti, P W 947, as having gone to the cremation ground (*Vol 11, p 277, ll 3-5*), as also Dbiren Mitra and Nripen Chatterji, though he was not sure about these two (*ibid, ll 9-11*). He stated that after the last Pujas he had a talk with one Atul Guha, who on hearing what he knew said that he was a pleader for the Bhowal Kumar and asked him to depose (*ibid, p 283, ll 20-24*).

As regards the witnesses named by the learned judge who merely saw the evening procession, only one Ranjit Singh, P W 940, was called before the Pujah vacation, namely, on the 26th September, 1934 (*Vol 10, p 379*), the others being examined on different dates between the 26th November, 1934, and the 31st January, 1935 (*P W's 963, 966, 978, 980, 983 and 1023*).

NO PROCURING OF FALSE EVIDENCE

Mr Chaudhuri's argument from these facts amounts to saying that these witnesses should have been all available to the plaintiff from the outset, and as they were not, the irresistible inference must be that they all came to perjure themselves in the interest of the plaintiff, irrespective of the intrinsic character of the evidence they gave. Frankly, I am not much impressed by this argument, as in my opinion the fact of the plaintiff not having been able to trace out these witnesses or ascertain their names until a late stage in the case is not after all such an improbability that it must be regarded with suspicion. It might perhaps have been a matter for legitimate comment, if having known about these witnesses from before, the plaintiff was still keeping them back from the court, till he could shape the evidence according to the exigencies of his case as they manifested themselves during the progress of the trial, but there is no foundation for any such assumption. Mr Chaudhuri went the length of suggesting that the witnesses began to flow in on an indication of the court's "favourable atmosphere",—which I consider to be a most unmerited attack on the learned judge

Judging from the plaintiff's conduct in the case, I am fully satisfied that he was no more trying to procure false evidence of the evening cremation than he intended to suppress available evidence from the court

It will be seen that quite early in the case the plaintiff through his witness Sitanta Kumar Bagchu had committed himself to a list of at least ten persons said to have been present at the evening cremation (*Vol 2, p 444, ll 13-15, p. 446, ll 20-23 and p 455, ll 12-15*), which he would not have done, if he was out to make a false case. Of these, only three were dead, namely, Shamapada Haldar, Satis Chandra Roy and Kishori Mohan Biswas (*ibid, p 444, ll 15-17*). Of the remaining seven, the plaintiff had cited Sanjub Chandra Lahuri, but did not call him, he had also cited Fakir Chandra Roy by a petition filed on the 28th February, 1931 (*not printed*), but this witness was got hold of by the defence to give a statement to a Magistrate on the 19th September, 1932 (*Ex Z (364), Vol II, pp 268-269*), and thereafter to give evidence on commission on their behalf on the 16th October, 1932 (*Vol 3, pp 1-15*), which by the way illustrates the forces at work the plaintiff had to contend with. He is also said to have cited Ram Das (Railway Guard), whose full name Sitanta Kumar Bagchu was unable to give (*Vol 2, p 446, l 28*), but who, according to Mr Chaudhuri, is the same man as Mohini Bhattacharjee examined in the Defamation Case. Among the rest, the witness himself was one, and the other three were Sashu Bhushan Bhattacharjee, Bijoy Chakravarti and Satis Babu (Clerk, Gymkhana, Darjeeling), the first named being also mentioned by Jatindra Chandra Chakravarty (*Vol 10, p 419, ll 23-24*), but neither of these persons appears to have been cited or called by the plaintiff. This clearly shows that the plaintiff was not going to conceal any names merely because he was not in a position to produce the witnesses, even his last cremation witness, Manmatha Nath Chowdhury, P W 986, named two persons who were not examined.

It should be clear now that when the learned judge, referring to the witnesses of the evening procession, said that he did not propose to give their evidence in detail, it was not because of any fear that their evidence would not stand the test of scrutiny. It is wholly wrong to say, as Mr Chaudhuri wanted to do, that he merely numbered the witnesses and did not weigh them. The learned judge believed them, and I hold that he had good reasons for doing so, but for the purpose of proving the mere fact of the procession, it would probably have been quite enough for the plaintiff to rely on the evidence of Padmini Mohon Neogy alone, coupled with that of the Maatra group and the other evidence given in support of death at dusk.

SEQUEL TO EVENING PROCESSION

Death at dusk and an evening procession starting thereafter at about 9 P.M. from "Step Aside" being thus established, the next question to be considered is one relating to the sequel to that procession.

Was the body cremated?

Given these two facts, and given also the admitted fact of a morning cremation, the answer to this question ought not to present any difficulty. To my mind it must follow almost with logical certainty that the evening cremation proved infructuous, whether the body taken out in the morning

was or was not the same as had been carried to the cremation ground the previous evening. If it was, the body must have been taken back to "Step Aside" in the course of the night, but it is agreed that this is not the case of either side. The only other alternative must, therefore, be that the next morning's cremation was carried out with another body, howsoever it might have been procured. As to this, admittedly there is no affirmative evidence on the plaintiff's side that it was not the body of the second Kumar, but there is positive testimony of the defendants to the contrary.

SUPPOSED IMPROBABILITY OF SUBSTITUTED BODY INVOLVED IN PLAINTIFF'S STORY

Mr Chaudhuri's argument is that because the plaintiff's case of death at dusk and an evening procession, coupled with the admitted cremation the next morning, thus involves as a necessary consequence such an extreme improbability, amounting almost to an impossibility, as that of the defendants having been able to obtain another body overnight for the morning cremation, the whole of the plaintiff's story must be rejected on this very ground.

I am not at all sure that this is not arguing in a circle. The improbability is undoubtedly there, but it is occasioned only by the plaintiff's admission of the morning cremation, and the very fact that he is prepared to face it by making this admission is by itself a circumstance which in my opinion tells very strongly in his favour. If the plaintiff's case was not true, is it at all probable that he should have taken upon himself this unnecessary burden by admitting the morning cremation? It should be emphasised that a morning cremation with a substituted body is no part of his substantive case, and he does not rely on it for the purpose of proving the failure of the evening attempt, which in fact he seeks to establish by direct and independent evidence of the happenings at the *sasan*. It should only serve to confirm the truthful character of such evidence that it entirely harmonises with the conclusion which otherwise follows from the very fact of two successive funerals purporting to be of the same person.

PLAINTIFF'S ADMISSION OF MORNING CREMATION WHAT IT MEANS

As I have indicated before, the admitted existence of the morning cremation is certainly a factor which cannot be left out in coming to a decision on the plaintiff's case of an evening cremation, but it only implies that if the morning cremation really related to the body of the second Kumar, then and then only would it destroy the plaintiff's evidence as to the evening cremation. I do not agree with Mr Chaudhuri that the mere admission of the plaintiff that there was a morning cremation is a fact going directly against the possibility of his case, on the other hand, as I have tried to show, this only goes to strengthen and confirm it. To say that the morning cremation must be considered along with the evening cremation to come to a conclusion can mean no more than this: that the evidence in support of the one must be weighed against that regarding the other, not that there is any initial presumption in favour of the defendants' story of a morning cremation, which must necessarily stand, if not rebutted by positive evidence on the plaintiff's side showing that the body then taken out was not that of the

Kumar To all visible appearances the morning cremation no doubt purported to be that of the Kumar, and was generally understood to be so, in other words, it was "apparently real", as Mr Chaudhuri put it, but it does not follow *ipso facto* that what had the appearance of reality must have been the reality, merely because the plaintiff is unable to give affirmative evidence that it was not in fact real. The plaintiff in my opinion will have fully discharged the onus of proof that lies on him, by showing that the Kumar's body was taken out for cremation in the evening, but could not be cremated, and once this is proved, it should be for the defendants to displace it by positive evidence on their side. In other words, the true position as it strikes me is that if the defendants can satisfy the Court by their evidence about the cremation of the real Kumar in the morning, then and then only will they have negatived the case of the plaintiff. Mr Chaudhuri says, you cannot first find the evening cremation and then displace the morning cremation by it, but by parity of reasoning, you cannot first find the morning cremation or assume it to be a fact and on that ground seek to destroy the evening cremation. In point of fact, the learned judge, as was only to be expected of him, has dealt with the defendants' evidence of the morning cremation on its own merits, as if death at dusk or the failure of the evening cremation had not been found at all (*Vol 18, p 377, ll 23-28*). The fallacy in Mr Chaudhuri's argument lies in the assumption that what the plaintiff admits to be only "apparently real" is an admission of the reality itself, and that, the "apparently real" must be taken as real, unless the party admitting it proves or explains why it should not be accepted as such.

NOT AN INTEGRAL PART OF PLAINTIFF'S CASE

Mr Chaudhuri tried to put his proposition in a simple form thus "if you say that the body taken out in the morning was the body of the Kumar, and do not give evidence that it was not the body of the Kumar, my evidence remains", but such a conclusion is doubly wrong—first, because of the wrong premises on which it is based, for, the plaintiff has never said that the Kumar's body was taken out in the morning, and secondly, because it assumes a morning cremation with another body as an integral part of the plaintiff's case the burden of proving which lies on him.

Mr Chaudhuri evidently set great store by this particular argument which he was never tired of repeating before us, but a little examination will show that it betrays a confusion of ideas. What are the respective cases of the parties in the pleadings? In the plaint there is no reference whatever to any morning cremation, in paragraph 2 where the Dargeeling part of his case is set out, the plaintiff merely avers that he (meaning the second Kumar) was taken for dead and carried to the cremation ground, on the night of the 8th May, but that owing to severe rain and storm the persons who carried the body ran away from the *sasan*, leaving it there, and that as on returning later, they missed the body and were unable to find it out, they went away without cremating it (*Vol 1, p 120*). In answer to this, the defendants assert in paragraph 14 of their written statement that the Kumar having died at about midnight, it was not possible to make necessary arrangements for his cremation at night, and that the next morning his body was taken out in procession and duly cremated (*ibid, p 174*). In this state of the pleadings, it seems to be quite plain that all that the plaintiff has to do is to prove the fact of an attempted cremation in the evening which turned out infructuous, while the defendants on their part are called upon to establish

the morning cremation alleged by them, which means their proving not only that a funeral procession left "Step Aside" in the morning, but that it left with the body of the second Kumar which was afterwards cremated in due course

It is a fact that at the trial the plaintiff led evidence to show that there was a cremation procession from "Step Aside" in the morning, but all that was said about the body which was taken along in it was that it purported to be that of the second Kumar, not that it was his,—the first witness to speak to this, if I am not mistaken, being Jadu Lal Mallick, P W 113 (*Vol 5, pp 97-98*), and then Swami Onkarananda, P W 603 (*Vol 8, pp 93-100*) among others. All this evidence, therefore, amounts to no more than an admission of the fact of a morning cremation. It was definitely not an admission that it related to the body of the real Kumar.

ONUS ON DEFENDANTS

A party to a suit is undoubtedly entitled to take advantage of an admission made by his opponent, but it is elementary law that he may do so only to the extent to which it goes. It follows accordingly that by reason of the evidence given on the plaintiff's side, the defendants in proving their substantive case in answer to his are merely relieved of the burden of adducing evidence of their own regarding the factum of the morning cremation. The burden of proving that the body was that of the Kumar will still be on them, and in my opinion they cannot hold themselves discharged from it merely because the plaintiff is not in a position to establish affirmatively the negative of their case. The plaintiff's evidence cannot be taken even as going near the fact of the Kumar's body having been taken out for the morning cremation, for it not only stops short of this, but definitely points contrari-wise.

Supposing the plaintiff proved the evening cremation and its failure, and no further, and no evidence was given on either side regarding the morning cremation, would his case about the non-cremation of the Kumar fail? Assuredly not. How, then, could it be argued, merely because the plaintiff gave some evidence of a morning cremation, that the burden was shifted on to him to prove that the body taken out for that cremation was not that of the second Kumar?

Under s 104 of the Indian Evidence Act, it might be said that if there were any other facts which were necessary to be proved in order to establish the evening cremation or its abortive sequel, the onus of proving such facts would be on the plaintiff, but to my mind it is not possible to contend with any semblance of reason that a morning funeral with a substituted body is such a fact. As I have already pointed out more than once, this is not a part of the plaintiff's substantive case as set out in his plaint, and even though he has led evidence about a morning cremation, he does not rely on it at all to establish the case he has made, which he in fact proves by other evidence regarding the incidents which happened at the cremation ground on the night of the 8th May.

DEFENCE ARGUMENT A PIECE OF SOPHISTRY

With all respect, the whole of Mr Chaudhuri's argument is a piece of finely wrought sophistry which fails to carry conviction. His next proposition

he thus formulates "if you keep the two cremations in separate compartments and contrast the one version with the other, you will have to decide on the preponderance of probability", and he proceeds to say that on this question of probability, if the two cases are evenly balanced, the court should decide in favour of the defendants. But it seems to me that the question really reduces itself to one of balancing the evidence on the one side against that on the other, in which probability is no doubt an element to be taken into account. On the other hand, the very improbability of the plaintiff's story,—indeed too fantastic for invention,—may be regarded as a factor telling strongly in its favour.

PROBABILITIES CONSIDERED

An important circumstance which it is impossible to overlook in this connection is that this story in its essential features—that of rain and storm dispersing the attendants in all directions and their missing the body upon their return to the spot where they had left it, as also of its subsequent rescue by a party of sadhus—did not take its rise for the first time for the purposes of the suit, or only upon the advent of the plaintiff at Jaidehpur even if the plaintiff's evidence of rumours to this effect having been current from after the return of the Kumar's party from Darjeeling be discarded, the defendants cannot deny that there was such a rumour in 1917, as shown by Rām Satyabhama's letter to the Maharajadhiraj of Burdwan dated the 3rd September of that year (*Exc Z(33), Vol II, p 175*)—not that the prevalence of a rumour is evidence of the truth of its contents, or that the rumour establishes the truth of the plaintiff's case. The fact remains that the defendants are unable to give a satisfactory explanation of the origin of this rumour of 1917, beyond making a suggestion that it was the offspring of the disordered imagination of Akhoy Roy (*Bepn Khansama, Vol 14, p 494, ll 3-8, and Rām Sahab Jogendra Nath Banerjee, Vol 15, p 444, l 35—p 445, l 3*) it is not shown that the plaintiff or any possible fore-runners of his had had anything to do with it. Supposing, however, in favour of the defendants that this rumour furnished a background for the manufacture of the story with which the plaintiff came to court, the plaintiff, if his story was false, would still require for its support a fortuitous concurrence of circumstances which it is difficult to imagine one could secure by sheer chance,—one, for instance, being the existence of two *sasans* in use at the time in question, the new with a shed over it, but the old with none.

If probabilities are to be taken into account, these are facts which cannot be altogether eliminated. But be that as it may, it should not be forgotten that this is an appeal, and the burden of showing that the judgment appealed from is wrong lies upon the appellant, and to quote the words used by Lord Buckmaster in delivering the judgment of the Judicial Committee in *Nabakshore Mandal v Upendra Kishore Mandal*, [1921] 26 C W N 322, *sc*, 35 C L J 116, "if all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded."

PLAINTIFF'S EVIDENCE AS TO MISSING OF BODY

The plaintiff's evidence regarding the events which happened at the cremation ground on the night of the 8th May resulting in the return of the funeral party without burning the body may be now briefly referred to the

learned judge has given a very correct and succinct summary of it (*Vol 18, p 366, ll 4-19*) It is not to be supposed for a moment that this evidence, if accepted, will carry the plaintiff the whole way on the Darjeeling part of his case, for the failure of the evening cremation would not necessarily show that the body which was taken to the *sasan* was still alive. Even if life had not been extinct at the time the body was missed, it might still have perished thereafter, though it had escaped the funeral pyre as the learned judge himself puts it, the fact that the body was left at the *sasan* during the rain and storm and disappeared is no proof that it was alive (*ibid, p 394, ll 10-12*)

The disappearance of the body from the cremation ground is, however, a fact which has to be first established, and to this end, as stated above, the plaintiff has adduced substantive evidence which has now to be considered

The body of direct evidence on the point comes from at least half a dozen witnesses, whose names have been already given and who all deposed in court with one exception, namely, Sitanta Kumar Bagchi, examined on commission more than a year before the commencement of the trial (*Vol 2, p 433*) The learned judge having seen and heard the witnesses has definitely accepted their testimony (*Vol 18, p 376, l 19*), though, as he says, the account they give, however consistent, sounds like a tale (*ibid, p 366, l 20*), which shows that he examined the evidence on the footing that the story was of a most unusual character. He has also fully taken into account all the facts and circumstances which the defendants urged as tending to discredit the story

It should be difficult, therefore, to interfere with the finding arrived at by the trial court mainly on verbal testimony given in court, unless on a full consideration of all the material, it is shown to be "clearly wrong", to use the language of the Judicial Committee in *Pr Ahsanullah Shah v Pir Ziauddin Shah*, (1937) 41 CWN 624

It does not in my opinion detract from the weight of that finding that the learned judge has not specifically discussed the evidence, of each of the witnesses, as Mr Chaudhuri says he should have done. This was hardly necessary, seeing that the testimony they gave was consistent and not contradictory in any material particular, and was assailed on certain common grounds each of which the learned judge considered at length

1

SITANTA KUMAR BAGCHI

To take first the evidence of Sitanta Kumar Bagchi, he was the earliest witness of the plaintiff regarding the evening cremation, examined on commission on the 26th and 27th June, 1932 (*Vol 2, pp 433-467*), and leaving aside discrepancies on non-essential points which seem to me only to confirm the truthfulness of his testimony, the story he gives corresponds in substantial details to the evidence of the other witnesses who deposed in court

He was employed as a probationer at the Darjeeling Head Post Office in May, 1909 and was putting up in the Postal Mess which was near the Post Office, along with 6 or 7 other postal employees whose names he gives (*ibid, p 441, ll 25-33*) He heard the news of the second Kumar's death at the Mall at about 8-30 P.M. from one of his fellow-boarders who reported that a gentleman had come to their Mess to ask for men to carry the dead body to the *sasan*. He did not remember who gave him the news (*ibid, p 444, ll 8-29*), but apparently he got it from one Aswini Kumar Sen, PW 672 (*Vol 8, pp 423-425*),

who, it may be added, says he saw the morning procession the next day near one Kartik Babu's clock shop on his way back from Jalapahar where he had gone the previous evening on an invitation to dinner at the house of the Palace Superintendent of the Raja of Dighapata. Mr Chaudhuri is wrong in saying that Aswini Kumar Sen is not mentioned by the witness—he is in fact one of the 16 postal clerks whom he names (*Vol 2, p 440, l 28*). On getting the news the witness hastened back to his quarters, had his meal, and then at about 9 or 9-15 P.M., proceeded to "Step Aside" with two of his friends. They met the procession as it was emerging from the house, and accompanied it to the cremation ground. It had started raining on the way, but the rain became heavier and was attended with storm after the procession reached the *sasan*. They waited there for half an hour, but unable to bear the rain any longer, ran away for shelter which they found in a small tin shed more than a mile off, leaving the body at the spot where they had put it down. More than half amongst them left for their homes, but those that remained returned to the cremation ground after the lapse of over an hour when the rains had abated a little. They were looking out for a suitable place for the funeral pyre, when a cry was raised that the body of the Kumar had disappeared. A thorough search was made with the help of lanterns, but the body could not be found, and the witness with his mess-mates and several others came back home, heavily drenched in the rain (*ibid, pp 433-437*).

The cross-examination was first directed to show that he was not employed at the Post Office at the time, but he remained wholly unshaken (*ibid, pp 440-441*). It was then sought to fix him regarding time, apparently in view of Padmini Mohon Neogy's statement which he is said to have given in the Defamation Case to the effect that the funeral procession had left "Step Aside" shortly after 7-30 P.M. (*Vol 3, p 251, ll 5-7*). He was asked how long it took to go from the Postal Mess to "Step Aside" and from "Step Aside" to the cremation ground (*Vol 2, p 442, l 23—p 443, l 5*), or when he got back to his mess (*ibid, p 460, ll 12-15*). Questions were also put to him about the men whom he had seen in the procession, and he gave 10 names which he could remember (*ibid, p 455, ll 12-16*),—a point I have already dealt with. Some inconsequential questions were also asked as to whether the dead body was tied to the bier or not, or there was any bedding on it, or whether the dead body was wrapped up with the bedding, or the bedding was on one side and the body on the other (*ibid, p 447, ll 24-34*), the object presumably being to test him by what Ram Sing Subha is supposed to have said in the Defamation Case (*Vol 11, p 77, ll 1-24*).

SUPPOSED NEW CASE REGARDING SASAN

The witness, again, was cross-examined about the cremation ground, which he said was situated below Chandmani and on the Tista and at the end of the Victoria Falls, which sprang out from Kagjhora (*Vol 2, p 436, ll 2-4*). Mr Chaudhuri made a great point that in cross-examination he stated that there was no fixed place for cremation at all, but that cremations used to be held wherever water was available from the waterfall (*ibid, p 451, ll 18-19 and 30-31*). This, it was suggested, was a new and a false case which the plaintiff was making through the witness for finding some ostensible ground why the cremation party should not have gone to the new *sasan*, which had already been in use since August 1907, with a shed over it where they could easily have found shelter against the inclemencies of the weather. It was said that the first case made by the plaintiff was that there was no shed in either

cremation ground, so that there would be no particular reason for preferring the new to the old *sasan*, which was in fact much nearer, but that, as this case was demolished by the defendants proving that there was a shelter, as also a covered pyre, at the new *sasan*, the plaintiff had to find some other excuse for avoiding this ground, and this he did through Sitanta Kumar Bagchi

It will be seen, in the first place, that the supposed new case imputed to the witness was not made by him in examination-in-chief, but elicited in cross-examination. Secondly, he was the first witness on the plaintiff's side regarding the evening cremation, and there was no question of the plaintiff making any case about the cremation ground at an earlier stage. The only basis for Mr Chaudhuri's suggestion seems to be a statement in cross-examination by the defendants' earliest witness of the morning cremation, Shyamadas Banerjee, examined on commission more than a year before Sitanta Kumar Bagchi, which is supposed to give an indication of the plaintiff's case, and was to this effect "This is not true that in the month of May, 1909 there was neither any tin shed at that place, nor was there any spring" (*Vol 1, p 260, ll 3-5*). It is not at all clear that the question to which this was an answer was not directed merely to elicit from the witness something which might show the existence of a *sasan* where there was no shed in May, 1909, the shed at the old site having been dismantled some time after May, 1907 (*Ex 204, Vol I, p 112*). Earlier in his cross-examination he had stated "Before the month of May, 1909, two years or one year or some months before—I had seen the said tin sheds for the first time" (*Vol 1, p 259, ll 3-5*). The *sasan* at the new site not having come into use before August 1907, and the shed on this site having been still under construction in July of that year (*Ex 203, Vol I, p 115, ll 23-24*), this answer might well have been taken to refer to the old site, and the later question put accordingly. Thirdly, there will have been no point in the plaintiff trying to deny the existence of the new *sasan*, or of the shelter there in May, 1909. Fourthly, it will be seen that the proceedings of the Darjeeling Hindu Burning and Burial Grounds Committee which show the dismantling of the old dilapidated shed and its re-erection on a new site with the same materials as far as possible, were produced by the defendants in March, 1933 through their witness R N Banerjee (*Vol 3, p 109, l 32—p 112, l 8*), examined on commission long after Sitanta Kumar Bagchi, who could not, therefore, be making a new case in anticipation of this evidence.

R N Banerjee, it may be observed, gave his evidence in direct negation of the records he produced (*Vol 3, p 108, ll 11-22*)

"Q—Do you remember if there was or was not any shed in the cremation ground?

A—There was a shed there which I saw in 1905 or 1906 and which I observed when I went to cremate the remains of Rai Bahadur Das, a medical practitioner at Darjeeling

(D W 411, Anuplsl Goswami, also gave the year of death of Rai Bahadur Das as 1905 or 1906 (*Vol 17, p 315, ll 24-25*))

Q—Was that shed in existence in the year 1909 when you went to cremate the dead body of the 'second Kumar?

A—It was exactly the same as when I first saw it in 1905 or 1906

Q—Is the present cremation ground the same as where the body of the Kumar was taken for cremation?

A—The grounds are the same, the place is the same, but it has been improved beyond recognition "

A MEANINGLESS THEORY

The present suggestion that Sitanta Kumar Bagchi was making a new case regarding the cremation ground was not put to the witness himself, and it is clearly an after-thought for which there is no foundation. His evidence does not in fact bear the interpretation which Mr Chandhuri seeks to put on it to support his meaningless theory. It merely shows that there was no fixed site for the funeral pyre, or *chuta*, as it is called in Bengali: there was only a small patch of flat or level ground, 6 or 7 cubits square, which he noticed (Vol 2, p 451, ll 13-15), but cremations were not confined to this spot: other sites might be selected according to convenience where water was available. This is also what later witnesses of the plaintiff say.

Bisweswar Mukherjee, P W 944 (in cross-examination) "There was no marked site or anything, people chose whatever spot they found convenient" (Vol 10, p 397, ll 23-24), *Jatindra Chandra Chakravarti*, P W 947 "At the *sasan* there was no fixed spot for the pyre" (Vol 10, p 420, l 10, see also *ibid*, p 422, ll 12-14 for further confirmation of the evidence), *Manmatha Nath Chowdhury*, P W 986 "In the old *sasan* there was no marked site for pyres" (Vol 11, p 283, l 1). By *sasan* would naturally be meant the whole of the surrounding area, and not merely the square plot, as is made clear by Sitanta Kumar Bagchi himself (Vol 2, p 452, ll 4-14).

In my opinion, there was no change of case at all made by the plaintiff by this evidence, as suggested by Mr Chandhuri, in view of the defendants disclosing the existence of a *sasan* with a shelter at a new site which could no longer be denied: the existence of such a *sasan* was not in fact put to the witness. Moreover, the plaintiff does not rely on this evidence at all as an explanation why the cremation party did not proceed to the new cremation ground.

QUESTION OF ROUTE

Mr Chandhuri next calls attention to Sitanta Kumar Bagchi's evidence regarding the route followed by the evening procession, which he says points to the 'Thorn Road route, and not that by the Commercial Row and Lloyd Road. The key to the route is said to lie in the location of the old Cutchery Building which was below 'Balén Villa', the residence of Mahendra Nath Banerjee, the Senior Government Pleader, where defendants' witnesses R N Banerjee and Geeta Devi were both staying. This is admitted (*vide Kiron Chandra Mustafi*, Vol 10, p 394, ll 15-19). It may be pointed out that the only importance of the route is in connection with the morning procession in which Geeta Devi is supposed to have seen R N Banerjee, as it passed along the road in front of Balén Villa, which would establish the participation of this witness in the cremation that day (Vol 3, p 160, ll 21-26, p 164, ll 12-13 and p 166, ll 5-8). Sitanta Kumar Bagchi, however, had nothing to do with the morning procession. In any case, it cannot be supposed that he was being cross-examined about the route of the evening procession in order to elicit from him in anticipation a likely confirmation of the morning route which Geeta Devi would be afterwards speaking to, though it was not known at the time what the plaintiff's case regarding the route was or was going to be.

Sitanta Kumar Bagchi was asked

"Q—By what route did you go to the cremation ground coming out from the "Step Aside"?"

A—We reached the cremation ground by passing along the Chowrasta, Market, Chandmari, Sanitarium- (L J), Kagjhora"

(Vol 2, p 448, ll 18-21)

This is perfectly ambiguous. Earlier, he had been asked what route should be followed if one had to pass the Postal Mess, going from "Step Aside" to the cremation ground, and he said there were many routes, and the one by the Postal Mess would be a circuitous one (*ibid*, p 442, ll 25-28). Later, he said that one could go to the cremation ground, crossing one side of the Mall and passing by the side of the Observatory Hill (*ibid*, p 443, ll 6-7), but this again is quite indefinite. Asked, however, as to where the crowd in the procession increased, he mentioned the Old Cutchery Building as one of the places where this happened (*ibid*, p 449, ll 21-23), which might suggest the Thorn Road route, but it need not, because people might join on the other route from the Cutchery Building which was only about 50 yards from the junction of Lloyd Road and Cart Road or from Chak Bazar, as the defendants elicited from P W 941, Kiron Chandra Mustafi in cross-examination (Vol 10, p 384, ll 21-23). He also mentioned Chandmari and the L J Sanitarium, but it is nobody's case that the procession passed by these two places. In any view, his statement might be no more than mistaken recollection on his part due to his idea of several persons having joined the procession from the Old Cutchery Building (Vol 2, p 449, ll 28-29). Be that as it may, this part of the evidence certainly does not establish that the witness was deposing falsely.

Another comment made by Mr Chandhuri is that Sitanta Kumar Bagchi gives a story materially different from that of later witnesses in so far as they say that the cremation party set out searching for a site for the pyre on reaching the *sasan*, while he says that they were looking for a site on their return from the shelter after the rains had abated (Vol 2, p 436, ll 34-35). Obviously, however, there is no inconsistency here, as the witness nowhere states that they did not look for a site on their arrival at the cremation ground.

It is not necessary to examine the evidence of this witness any further he was a responsible Government officer in the grade of Rs 140/- a month at the time he was deposing (*ibid*, p 466, l 4), and a recipient of gold and silver medals and certificates as a reward for Field Service rendered in 1918 in France, Egypt, Asia Minor, Syria, Turkey and Russia during the last Great War (*ibid*, p 433, ll 25-30). he is not shown to be a partisan witness at all. In my opinion, Mr Chandhuri has wholly failed to point out any discrepancies or improbabilities, inherent or otherwise, in his evidence which should discredit him, or to advance any valid reasons for holding that the learned judge was "clearly wrong" in accepting his testimony.

OTHER WITNESSES OF EVENING CREMATION

As regards the other witnesses of the evening cremation, as already stated, they were all examined in court, and the learned judge had the

opportunity of observing their demeanour in the box, and in my opinion, the appellate court should not, in the absence of strong and convincing grounds, disregard the view expressed by the trial court as to the credibility of their evidence. I hold that no such grounds have been established before us.

KIRON CHANDRA MUSTAFI

Kiron Chandra Mustafi, P W 941 (*Vol 10, pp 383-386*), is a retired tea-planter who lived at Darjeeling for 34 years, having been Assistant Manager of Bloomfield Tea Estate from 1900 to 1928, this being a garden situated about a mile from the railway station on the way to Ghoom (*ibid, p 383, ll 1-20 and p 385, ll 13-15*). He accompanied the evening procession, that being his only visit to the Darjeeling *sasan*, which, if only on this ground, he might be well expected to remember (*ibid, p 383, ll 21-22*). Mr Chaudhuri ridicules him as a "chance processionist", who as a Kayastha would have no business to attend a Brahmin's funeral, forgetting that such a test would disqualify many of his own witnesses of the morning cremation, and is in fact repudiated by some of them. His evidence is that he went, because people were being called and a sufficient number had not gone (*ibid, p 383, ll 24-28*), on which point there was no cross-examination. He gives the route as that by the Commercial Row, though he is not sure about it (*ibid, p. 383, ll 34-36*). He speaks to the rain and storm, and to his running away for shelter with six or seven others to a shed near a slaughter-house where they waited for about an hour or so till the rain had abated (*ibid, p 384, ll 1-6*). The shelter was a quarter of a mile off (*ibid, p 384, l 40*). On returning to the *sasan* they missed the body, but he came away after a few minutes, as he had a long way to go (*ibid, p 384, ll 10-11*). Some 15 people remained there when he left (*ibid, p 385, l 11*). A point made by Mr Chaudhuri was that he did not ask subsequently whether the body had been found (*ibid, p 385, l 12*), but he made a significant statement that he heard the body had been cremated (*ibid, p 385, l 26*), and in re-examination he made it clearer by saying "I thought that the same body had been found and cremated" (*ibid, p 386, l 10*). Apparently, the staging of the morning procession did not fail to produce the desired result.

BISWESWAR MUKHERJEE

The next witness is Bisweswar Mukherjee, P W 944 (*Vol 10, pp 394-399*), who was in service in the Deputy Commissioner's Office at Darjeeling from 1899 to 1907, and then at Kurseong at the office of the Joint Magistrate from 1907 to 1914 (*ibid, p 394, ll 15-18*). He speaks about a feast at Kurseong on a Sunday, following the *snadh* of the Raja of Kakina. He went up to Darjeeling the previous evening to bring down a musical party to Kurseong for the occasion the next day from the Hindu Public Hall Amusement Club (*ibid, p 394, ll 38-40*). At the Club he heard about the death of the Kumar of Bhowal, and at the request of Sanjib Lahiri whom he met there, agreed to go to the cremation. Sanjib Babu and he actually put their shoulders to the bier on and off on the way. He also mentions the Commercial Row route (*ibid, p 395, ll 1-20*). He did not wait long at the *sasan*, but came away after putting down the body there, partly because

he had to return to Kurseong the next morning and partly because the weather was threatening (*ibid*, p 395, ll 24-26) The following morning he went back to Kurseong with a large number of people from Darjeeling, among whom he mentions R N Banerjee (*ibid*, p 395, ll 33-37) He says he had been to the old *sasan* once in 1901 or 1902 when there was a shed there in a dilapidated condition, but he found none on the present occasion (*ibid*, p 396, ll 8-10) There is nothing in the cross-examination which affects the evidence Mr Chaudhuri, as usual, calls him a chance witness, but the *Kakina shadh* is admitted, and his connection with the Amusement Club, of which he was Assistant Secretary while he was at Darjeeling, is again a fact which could not be, and was not, disputed in cross-examination If this was false evidence, the witness might easily have stayed on at the *sasan* much longer than he did if only to lend point to Mr Chaudhuri's suggestion as to the plaintiff's craving for "corroboration's crafty aid"

JATINDRA CHANDRA CHAKRAVARTI

As for the next witness, Jatindra Chandra Chakravarti, P W 947 (*Vol* 10, pp 418-424), he is a man of Solaghar in the district of Dacca, where the husband of defendants' witness Jagat Mohini Das is also supposed to have had his home, Rajani Kanta Chakravarti being the name she gives of her husband (*Vol* 1, p 281, ll 12-13 and p 284, ll 34-35) The witness was at Darjeeling from 1904 to 1933, and was staying at the house of his sister's husband Rajkumar Kusari, since deceased, his sister being Susila Sundari Devi, now an old lady of over 60 years, who and whose son Sailendra Kumar Kushari have both given evidence to corroborate his story as P W 1016 (*Vol* 11, pp 516-521) and P W 1140 (*Vol* 11, pp 329-333), respectively In 1909 the witness was employed in the Municipal Office at Darjeeling, and he remembers having seen the second Kumar there on three or four occasions during the latter's visit in that year (*Vol* 10, p 418, l 37 —p 419, l 15) He heard the news of the Kumar's death at about 7 or 7-30 P M, and at the suggestion of his sister's husband went over to "Step Aside" with his elder brother Basanta Chakravarti (since dead), to assist in the cremation He found there several persons whom he knew, among whom he remembers Anukul Chatterjee, Sasi Bhusan Bhattacharjee and Fakir Chandra Roy,—the last two names, it will be remembered, having been mentioned by Sitanta Kumar Bagchi along with others (*ibid*, p 419, ll 22-24) He also met Sitanta Kumar Bagchi in the procession (*ibid*, p 419, l 36), which he says went by the Commercial Row route He speaks to severe storm and rain breaking out within a few minutes of their arrival at the *sasan*, in consequence of which five or six of them, including his brother, Anukul Chatterjee and Sanjib Lahuri, ran up and "took shelter in a slaughter-house above," which had a shed (*ibid*, p 420, ll 6-15) They waited there for about an hour, and then went back to the *sasan*, only to find a number of persons running about with lanterns, looking for the dead body which was said to have disappeared They joined in the search, but after 10 or 15 minutes they came away drenched in the rain, but several people stayed on (*ibid*, p 420, ll 15-24) Next day he was due to go to Kurseong for the *Kakina shadh*, but was unable to do so, as he was suffering from the effects of his experience overnight In the afternoon he heard that the Kumar's body had been cremated, which appeared to be strange, but he thought the body had been recovered by those who had remained behind (*ibid*, p 420, ll 25-30) He denies that Jagat Mohini is the wife of

Rajani Kanta Chakravarti of Solaghar, whom he knew, as he was his family priest (*ibid*, p 421, ll 5-15)

The evidence of the witness is challenged, first, because he did not enquire the next day how the body had disappeared, but he explains that he did not do so, as he knew this to be a fact (*ibid*, p 421, l 29) When he found the corpse gone, he was of course "dumb-founded with surprise" (*ibid*, p 421, l 42) Secondly, his reaction on hearing about the cremation of the body the next day is said to be "extraordinary", but he states quite frankly that he thought that the body had been recovered after he had come away from the *sasan*, and did not think it necessary to make any further enquiry (*ibid*; p 422, ll 7-10) There was in fact no further enquiry to make, as the Kumar's own people left the station the very next day Another comment made against this witness is that he said he took shelter in a slaughter-house, but this would be incorrect, only if he meant the *new* slaughter-house, which, however, he did not do, and it is not even suggested in cross-examination that he did, the cross-examination being solely on the point how many minutes' ascent the shelter was from the *sasan* (*ibid*, p 424, ll 8-10) The question of the slaughter-house which is supposed to destroy the evidence not only of this witness, but also of the next witness Chandra Singh, P W 968 (*Vol 11*, pp 84-94), and on which Mr Chaudhuri has laid considerable stress, will have to be considered more fully later on

CHANDRA SINGH.

Chandra Singh is a hiltman, who, as the learned judge indicates, gives his story of the happenings at the *sasan* in graphic detail (*Vol 18*, p 366, ll 17-18) He is a Government pensioner, who was Record Keeper in the Deputy Commissioner's office at Darjeeling, and has an income of Rs 5,000/- to Rs 6,000/- per year from landed properties, for which he pays Rs 600/- as land revenue (*Vol 11*, p 84, ll 11-16 and p 94, l 1-7) In 1909 he was attached to the Kalimpong Khas Mahal office, but came to Darjeeling towards the end of April in the course of his official duties, and was staying at his house in Bhutia Bustee, which is some distance below "Step Aside" down Rangit Road (*ibid*, p 85, ll 1-13) He got the news of the Kumar's death from two Bengalee Babus of the Engineer's office between 7-30 and 8 P M at or near the gate of "Wigwam", and went over with them to "Step Aside" which was close by, as they asked him to go (*ibid*, p 85, ll 33-40) He got to the upper storey by the sloping path, and saw there a dead body in a small room lying on the floor, covered with a white sheet (*ibid*, p 86, ll 1-9) He identified the room as Room No 5 where Ram Sing Subha had also seen the body The witness accompanied the funeral procession to the *sasan*, passing along the Commercial Row route (*ibid*, p 86, ll 26-38) They went to the old *sasan* and not to the new, as he says the party carrying the body were "dead tired" and the road to the *new sasan* was "very bad" (*ibid*, p 87, ll 1-4) Setting down the body on a small plot here, they started looking out for a suitable site for the pyre when it began to rain very heavily They got wet and ran for shelter, and some 10 or 15 of them found it in the slaughter-house which they had passed on their way to the burning ground (*ibid*, p 87, ll 6-12) After the rain stopped, they got back to the *sasan* and saw a number of people with lanterns looking out for the dead body "Where is the dead body? Where is the dead body?" they cried (*ibid*, ll 16-19) He got frightened, as supposing the dead man had come to life and returned

and touched him, it would mean his having to stay on the spot for 13 days (*ibid*, p 87, ll 19-21),—a queer explanation, as it would strike us, but not so perhaps for a hillman with his quaint beliefs and superstitions about the supernatural. He hurried back home, purified himself by a bath and went to bed. Next day he got up very late with a chill. He had been to the *sasan* before this in 1902 to cremate his aunt when there was an old shed there (*ibid*, p 87, ll 28-30). The main reason why his evidence is sought to be discredited is his reference to the slaughter-house, and also because he said that Morganstem's house "Rosary" did not exist there in 1909 (*ibid*, p 88, ll 1-3). The suggestion is that he was procured by Upen Bose, who is said to be a relation of Digendra Ghose (*ibid*, p 93, ll 32-39), the latter being presumably the same man who was President of the Bhowal Taluqdar and Proja Samiti (*Vol 18*, p 108, ll 27-80). It is not clear, however, why or how the witness, quite a respectable person, in no way connected with the plaintiff, should or could have produced a story in such circumstantial detail out of his imagination.

MANMATHA NATH CHOWDHURY

The last witness is Manmatha Nath Chowdhury, P W 986 (*Vol 11*, pp 276-283), sole proprietor of the Darjeeling Motor Service, quite a big concern dealing in the sale and hire of motor vehicles, paying annually nearly Rs 2,000/- as motor tax and enjoying the patronage of Government. One of his brothers is in the Imperial Service posted at the Alipore Test House. He came to Darjeeling in 1899 to take up service in the Planters' Club where he was drawing Rs 210/- per month when he left it in 1924 to join the motor business, and has been residing there ever since (*ibid*, p 276, ll 11-26). News of the second Kumar's death was received by him at about 7-30 P.M. so far as he remembers, through a telephonic message from Sanjib Lahiri who asked him to come over for cremation (*ibid*, p 276, ll 29-32 and p 280, ll 18-19). During the hearing we obtained from the office of the Post Master General, Bengal and Assam, a list showing the telephonic connections on the Darjeeling Exchange in 1909, which was marked by consent as an exhibit in this court, *Ex P M B B (1)*, on the 26th June, 1939, and it shows that there were only five connections of which one was at the Planters' Club, the other four being one at the Gymkhana Club, one at the Deputy Commissioner's office, and two at the Maharajadhiraj Bahadur of Burdwan's house "Rose Bank". The witness was one of a set of young men at Darjeeling who considered it their duty to volunteer their services at cremations, the sons of Mahendra Nath Banerjee including R N Banerjee being admittedly in this group (*ibid*, p 276, ll 33-34 and p 282, ll 16-19). This naturally made him a frequent visitor to the *sasan*, and Mr Chaudhuri tauntingly described him as "the hero of a thousand cremations", because he said that he had cremated "some 2000 or 4000 bodies" (*ibid*, p 282, ll 4-5), which counsel chose to take literally, forgetting that this was no more than the familiar way of a Bengalee for saying that he had taken part in innumerable cremations. From the account which the witness gave of the two *sasans*, Mr Chaudhuri went the length of suggesting that he could never have gone to the Kumar's cremation, as if after admitting having taken part in so many cremations, he was likely to blunder in his description of mere physical features. The fatal mistake he made is supposed to lie in his statement "It is difficult to say if the new and old *sasans* are on the same level—but the new *sasan* might be slightly higher" (*ibid*, p 279, ll 21-23). Earlier in his

evidence he stated as follows —“We took the body to the old *sasan*. In those days it was difficult to go to the new *sasan* at night as one had to get down into a *ghora* and then to get up to the other side (*witness shows by his hand descent and ascent down and up the sides of a ghora*)” (*ibid*, p 277, ll 16-19). All this was in his examination-in-chief, and not a word was put to him in cross-examination to suggest anything to the contrary. Not to be able to state the relative levels of the two *sasans* is no indication of false evidence even Manmohan Sen Gupta, P W 960, who was Assistant Secretary of the Hindu Burial and Burning Grounds Committee at the time, and who admittedly made the plan of the new *sasan* in 1907 for sanction to the proposed constructions (*Ex 202, Map No 2, Book of Maps*) and knew the topography of the place well, giving evidence before this witness, said “I can’t say whether the old *sasan* is relatively lower than the new *sasan*”, though he added that “to go to the new *sasan* by (the old) Sudhir Kumari Road one goes continuously downhill” (*Vol 11, p 37, ll 7-9*). The witness stated quite correctly that the old Sudhir Kumari Road along which they took the corpse was a difficult road, and at points two people could not go abreast (*ibid*, p 277, ll 21-22), and further said that the new Sudhir Kumari Road did not exist in 1909 (*ibid*, p 279, ll 5-7), a fact which the defendants could not deny. He did not remember having seen any shed in the old *sasan* (*ibid*, p 283, ll 2-3). He found it difficult to say when the new *sasan* came into use (*ibid*, p 281, ll 39-40), but his evidence is that dead bodies would be cremated in the old *sasan* until the new Sudhir Kumari Road was made, though the new *sasan* would be occasionally used during the day, as happened in the case of Mahendra Nath Banerjee, Government Pleader (*ibid*, p 279, ll 8-14), his first visit to the new *sasan* being on that occasion (*ibid*, p 281, ll 40-41). The witness gives the same story as the others regarding the evening procession from “Step Aside” which he joined at the Chowrasta Junction, and accompanied along the Commercial Row route. He did not stop long at the *sasan*, but came away within a few minutes of his arrival, as many other people were there and his presence was not necessary (*ibid*, p 280, ll 22-24). He was going to the *Kakina stadh*, the next morning (*ibid*, p 278, l 7). It had started raining when he got to the *sasan*, and he encountered heavy rain on his way back a little below Morganstein’s garden, which compelled him to take shelter in a shed there for half or three quarters of an hour (*ibid*, p 277, ll 31-33), it was probably a *mali*’s shed (*ibid*, p 281, ll 22-23), and was situated near the site of the present slaughter-house, which, however, did not exist there then, though probably there was a slaughter-house below (*ibid*, p 277, ll 34-38). He heard the next day about the missing of the dead body during the night, and also about another cremation the following morning (*ibid*, p 278, ll 30-39). In his examination-in-chief he gives the information that there was a rain-gauge in the gardens of the Planters’ Club, and that a record used to be kept here of rainfall and temperature. The record is not forthcoming, but the witness speaks of a visit of two Bengalee gentlemen to the Club about 2 or 3 years before he left his service there, who are said to have taken away one of the rainfall registers from the Secretary Mr Trum (wrongly printed as Mr Tum), which they did not return so far as the witness knew (*ibid*, p 279, ll 24-38). The Secretary is said to have initialed a particular page in the book which was pointed out to him by the persons who called for it, and who took it away after giving a receipt for the same (*ibid*, p 283, ll 9-10), which it is said was preserved but has not been produced. Reading the evidence of the witness as a whole, I am unable to say that it bears any such obvious marks of falsehood that it must be rejected.

In judging the oral testimony of these witnesses, I do not think it would be right to exact meticulous accuracy in regard to details, nor will it do to attach undue importance to small discrepancies between witness and witness, but legitimate allowance must be made for lapse of time, seeing that they are speaking from recollection nearly 25 years old and if this is done, I see no reason whatever why the story they relate should not be accepted as substantially true, however strange it may appear to be

GENERAL ATTACK ON THE EVIDENCE

The defendants have, however, urged certain considerations of a general character as tending to falsify the whole of this body of evidence, which it will be now necessary to examine

They first emphasise the improbabilities of the story, and then say that in point of fact there were no huts or sheds, much less a slaughter-house, where any of the cremation party could have found shelter, nor was there any rain or storm that night

ALLEGED IMPROBABILITIES OF THE STORY

As regards the improbabilities, it is first said that it would be "unnatural" and "grossly inhuman" to leave the body in the rain and run away for shelter. But supposing for a moment that the processionists were overtaken by a sudden burst of heavy rain and storm at the old *sasan*, what should have been the correct conduct on their part which would not lay them open to a charge of "unnaturalness" or "gross inhumanity"? Should they still have run about hither and thither with the *charpoy* over their shoulders, or carried it to a shelter which they did not yet know where to find, or should they have left somebody at the spot to keep vigil over the body till the others returned? Would there be any point in their doing so? None of them had the gift of prophetic vision to have been able to foresee the danger to be guarded against, and the dead did not require the same protection from the weather as the living. So long, therefore, as no disrespect to the "deceased" was intended, and so long as there was no question of abandoning the "dead" body to its fate, one fails to see either improbability or impropriety in the conduct of those who ran away, expecting to return as soon as the rain held off

The evidence does not show that the cremation party all left the body simultaneously if any of them, therefore, were to be held to blame, it could be only those who were the last to leave, and it is not shown who they were. Sitanta Kumar Bagchi says "When I found 2 or 4 persons going upwards, I with my 3 friends began to run upwards" (Vol 2, p 458, ll 10-11). His idea was that all those who had gone to the cremation ground left it "I do not think anyone stayed there" (*ibid*, ll 16-17), but this does not imply that they all left together. Kiron Chandra Mustafi says "7 or 8 of us came away among others" (Vol 10, p 384, ll 3-4), and then in cross-examination "I cannot say if all ran away from the *sasan* or if any remained, I did not enquire if any member of the family remained when I ran for shelter, some people were on the *sasan* still, but I saw some people also leaving the *sasan*, but I cannot say if any did not leave at all" (*ibid*, p 384, ll 35-40). On returning from the shelter, he did not ask who had remained in the *sasan* (*ibid*, p 385, ll 8-9). Jatindra Chandra Chakravarti speaks only of 5 or 6 people including himself running up and taking shelter in a slaughter-house (Vol 10, p 420, ll 11-12). Chandra Singh says "I ran for shelter—and running and falling and stumbling, I had no time to see if any stayed

on at the sasan" (Vol 11, p 90, ll 25-27), and he speaks of "some 10 or 15 people only" who sought shelter including himself (*ibid*, p 87, ll 11-12) Mr Chaudhuri's objection, therefore, seems to be utterly pointless

OLD VS NEW SASAN

It is next asked why the cremation party should have gone to the old sasan, and not to the new, specially as the weather was threatening, and admittedly they had with them Sanjiv Chandra Lahiri, Assistant Secretary of the Hindu Burning and Burial Grounds Committee, who might have been expected to guide them to the new sasan where there was a proper shelter. The answer is—the night was dark (*Sitanta Kumar Bagchi*, Vol 2, p 447, l 29), the old sasan was nearer, the new one was more than a furlong away and the road to it was difficult with a jhora intercepting it, and it had already started raining, so that even if the new sasan was their objective, they could not avoid being thoroughly drenched before they got there. The very condition of the weather which it is suggested should have taken them to the sheltered sasan might have been the reason for detaining them at the other place, without a shed as it was.

It is now admitted before us on both sides that the new sasan came into use in August, 1907, but the new Sudhir Kumari Road which gave easy access to it was not constructed until some time in 1912. The plaintiff's evidence is that the old sasan would, however, still be in use, and though the defendants attempted to prove the contrary, in my opinion, the attempt has failed, as will be shown presently. It is also now admitted that there was no shed in the old sasan in 1909, but there was one at the new, constructed partly with the materials of the old after it had been dismantled. The learned judge has given a fairly correct summary of the proceedings of the Hindu Burning and Burial Grounds Committee which really establish these admitted facts beyond the possibility of dispute (Vol 18, p 370, l 27—p 371, l 26).

It is significant, however, that at the trial defendants would not admit at first either the existence of two cremation grounds or the fact that there was no shed standing at the old sasan in 1909 (see, *plaintiff's petition of the 22nd December, 1934*, Vol 11, p 296, para 4). Their suggestion at the earlier stage of the case apparently was that there was only one cremation ground and that provided with a shelter, so that this fact alone would be enough to destroy the plaintiff's story. If the evening processionists carried the body to such a place for cremation, there would obviously be no occasion for any of them to run away even in rain and storm, and if the body was not left unattended, it could not possibly have disappeared.

CHARGE OF "BIAS" AGAINST THE JUDGE

Such a case could not, however, be supported for a moment in the light of the facts disclosed by the defendants' own documents, particularly the proceedings of the Hindu Burning and Burial Grounds Committee referred to above, which, as stated, they produced through their witness R. N. Banerjee. Lest perhaps it might reflect on their unwavering regard for truth and for nothing but the truth which Mr Chaudhuri claimed for his clients, he indignantly repudiated the suggestion that this was their case at any stage. He went the length of accusing the learned judge of "bias", because of his

saying that "a most determined attempt was made by the defendants up to a stage to show that the new *sasan* had always been the *sasan*, and the shed that stood there in May, 1909 had always been there" (*Vol 18, p 370, ll 12-14*)

In order to see where the truth lies, one has, however, only to read the evidence of defendants' own witness R N Banerjee already quoted (*Vol 3, p 108, ll 11-22*), which was to the effect that the *sasan* he saw in 1909 when he went to cremate the dead body of the second Kumar was the very same *sasan* he had seen in 1905, shed and all,—evidence, be it noted, as I have already pointed out, given in direct contradiction to the records which he himself produced. Here was a member of the English Bar speaking, and speaking with no halting accents, and I cannot help remarking that Mr Chaudhuri might well have reserved his indignation for his own witness rather than for the trial judge.

NO CHANGE OF CASE ON PLAINTIFF'S SIDE

On the plaintiff's side it will be seen there was no change of case at all made regarding the cremation ground. His case all along was that the *sasan* to which the body was taken in the evening had no shed in it at the time, and he was never concerned to dispute the fact that there was a shelter at the new *sasan*. His earliest witness Sitanta Kumar Bagchi definitely stated that there was no shelter (*Vol 2, p 436, ll 14-15*), and in cross-examination he also indicated that the cremation ground was a *kutchra*, and not a *pucca* or brick-built one (*ibid, p 451, ll 6-7*). There was no suggestion in cross-examination that there was a newly-built *sasan* with a *pucca* shelter. It does not appear that the defendants' commission witnesses like Shyamadas Banerjee or Rajendra Nath Sett or Bijoy Krishna Mukherjee or Mohendra Nath Banerjee or any of the others who speak about the cremation ground, hinted at the existence of two *sasans*, one old and abandoned, and the other recent and in use. It may be that there was no cross-examination of any of these witnesses from the plaintiff's side to suggest the existence of the old *sasan* as distinguished from the new, but this is easily accounted for by the fact that a case of two *sasans* had not yet been made by the defendants. A brief reference to the evidence of some of these witnesses may be given —

(1) SHYAMADAS BANERJEE (*Vol 1*)

(*p 258, ll 26-27*) "There was a *pucca* tin shed at that time in the cremation ground at Darjeeling where the Kumar's dead body was burnt "

(*p 259, ll 3-5*) (*in cross-examination*) "Before the month of May, 1909, 2 years or 1 year or some months before—I had seen the said tin shed for the first time "

(*p 260, ll 3-5*) "This is not true that in the month of May, 1909, there was neither any tin shed at that place nor was there any spring "

(2) RAJENDRA NATH SETT (*Vol 1*)

(*p 302, l 31*) "There was a tin shed in the cremation ground "

(3) BIJOY KRISHNA MUKHERJEE (*Vol 1*)

(*p 315, l 15*) "There was something like a shed "

(*p 320, l 42—p 321, l 1*) "The tin shed was perhaps at a distance of 5/6 cubits from the pyre "

(4) MOHENDRA NATH BANERJEE (Vol 1)

(p 324, ll 39-40) "Sometimes on the hill-side, sometimes within something of the nature of a tin shed "

(p 329, ll 1-2) "I distinctly remember that I saw that shed of which I have already said, at that time on the 'cremation ground' "

If I am not mistaken, the first suggestion of a new *sasan*, which was a regular *sasan*, close to the place where the second Kumar's body is said to have been taken in the evening, was made in a definite form to plaintiff's witness Bisweswar Mukherjee, P.W 944

"Q—Did you know then that there was then a new *sasan* called Hindu Cremation Ground?

A—No

I did not go to the *sasan* after 1909 I did not know then that quite close to it was a 'regular *sasan*' On all occasions I went to the *sasan*, I went to the one I went to in 1909

Q—And there was no other?

A—No" (Vol 10, p 397, ll 14-21)

The witness, it will be remembered, was employed in the Deputy Commissioner's Office at Darjeeling only up to 1907 when he was transferred to Kurseong, and was not likely, therefore, to know about the re-construction of the *sasan* at the new site which commenced only in the latter half of that year

The next witness of the evening cremation, on the plaintiff's side was Jatindra Chandra Chakravarti, P.W 947, (Vol 10, pp 418-424), but not a word was put to him in cross-examination about there being a new *sasan*

DEFENDANTS' CASE OF A SINGLE SASAN

It might be interesting to point out here that an attempt was made to elicit from an earlier witness of the plaintiff Madhusudan Mukherjee, P.W 807 (Vol 9, pp 316-318), on the strength of a supposed previous statement of his, that there was only one cremation ground for the Hindus down the Kagjhora. The original of this statement which appears to have been recorded in July, 1921 by a Deputy Magistrate at Patna in connection with the Lindsay enquiry, was forwarded by the District Magistrate, Patna, to the Collector of Dacca at the time, as can be seen from the correspondence printed at pp 210-212 of the Appendix volume, but only a copy was put to the witness when he was under examination on the 11th August, 1934, without any evidence how or from whom the copy was procured. In November, 1935 Rai Bahadur Sasanka Coomarr Ghosh was writing to enquire if the original could be traced in the office of the District Magistrate at Patna, but it was not forthcoming (*ibid*, p 213). The witness did not remember if he made the statement, nor was he prepared to deny it (Vol 9, p 317, l 35), but the genuineness of the copy seems to me to be more than doubtful, and the document is certainly not evidence. The witness, however, admitted having said in answer to a question "I know there is one cremation ground for the Hindus down the Kagjhora", but he explains that he knew of only one, and did not know if there were more than one (*ibid*, p 318, ll 10-15). As I read it, the object of the cross-examination was not to obtain a denial, but only a confirmation

of his previous statement, showing that the defendants had not yet abandoned their case of a single cremation ground of course with a *pucca* shelter on it.

PLAINTIFF'S EVIDENCE OF TWO SASANS

While the plaintiff had still several of his witnesses to come and depose about the evening cremation, he put into the box Moni Mohan Sen Gupta, P W 960, (Vol 11, pp 35-39), who gave definite evidence regarding the existence of the two *sasans*. He was Assistant Secretary of the Hindu Burial and Burning Grounds Committee before Sanjib Chandra Lahiri, and as I have already pointed out, he prepared the plan which had to be submitted to the Darjeeling Municipality for sanction to the proposed re-construction of the *sasan* at the new site (*Ex 202, Map No 2 in the Book of Maps*). This shows quite distinctly the position of the "existing" and of the "proposed" flats and sheds for cremation. His evidence is fully borne out by the records of the Committee. He says that in 1907 the shed at the old site was in a dilapidated state and that its materials were utilised in making the new shed (Vol 11, p 35, l 38—p 36, l 2). He corroborates other witnesses of the plaintiff that in the old *sasan* there was no fixed *pucca* spot for cremation (*ibid*, p 36, l 16), and proves the existence of a *ghoia* between the old and the new *sasan* (*ibid*, p 36, ll 32-36). He also makes it clear that there was no communication from the old *sasan* to the new and the depths between the two were "sheer" at places (*ibid*, p 38, ll 6-7). He was at Darjeeling from 1904 to 1908 as an Estimator in the "Superintending Engineer's office, P W D, and says that the first person to be cremated at the new *sasan* after its construction was his mother who died in August, 1907 (*ibid*, p 37, ll 13-14), a fact which the defendants accept and is corroborated by D W 411, Anuplal Goswami (Vol 17, p 03, ll 30-33). After this, according to him, the new *sasan* was used so long as he was at Darjeeling (Vol 11, p 38, ll 20-21), but as he explains in re-examination, there was still no bar to anybody going to the old *sasan* and using it for cremation (*ibid*, p 39, ll 22-23).

It is not necessary to refer to all the other witnesses of the plaintiff who speak about two *sasans*: suffice it to cite only a few —

- (1) Dhanyut, P W 966 (Vol 11, p 61, ll 37-40)

"There are two cremating places at Darjeeling—it is two places, one roofed over, and the other not, close to each other",

- (2) Ram Sing Subha, P W 967, speaking of the morning cremation (Vol 11, p 67, ll 4-6)

"The cremation ground we went to was the new cremation ground, not to the old cremation ground. At that time there was no *pucca* pyre on the new cremation ground" (This last is a fact corroborated by the records of the Burning Grounds Committee, which shows that the pyre shed was erected somewhere about June, 1909 (*Ex Z 129*, Vol I, p 141, l 16))

- (3) Chandra Singh (Vol 11, p 86, ll 38-39)

"There are two burning grounds at Darjeeling"

As to whether the old *sasan* was still in use after the new one was completed in August, 1907, though without the pyre shed and without a proper approach, as is the plaintiff's case, the evidence is overwhelming on his side. Mr Chaudhuri says that none of the plaintiff's witnesses gave any

specific instance of any body being burnt in the old *sasan* after the new had come into existence, but this is an inaccurate statement. Sitanta Kumar Bagchi at least gives one such instance: he went to this *sasan* in December, 1908, to cremate a son of Harendra Kumar Sen, a postal clerk (*Vol 2, p 443, ll 18-25*).

Learned counsel also calls attention to a statement made by Basanta Kumar Mukherjee, P W 823, one of the plaintiff's witnesses of the morning cremation, to the effect that the old *sasan* was "in an abandoned condition" (*Vol 9, p 384, ll 13-15*), but this was said in examination-in-chief and cannot imply that no one could or would go to the old *sasan* for cremation. The statement of Madhusudan Mukherjee, P W 807 (*Vol 9, p 318, ll 10-15*), on which, again, he relies, has been already dealt with. It is equally futile for Mr Chaudhuri to refer, to the evidence of Moni Mohan Sen Gupta, P W 960, who, as pointed out before, clearly states in re-examination that after the new *sasan* came into existence, there was no bar to the use of the old one (*Vol 11, p 39, ll 22-23*). Another witness of the plaintiff, Kazi Samsuddin Ahmed, P W 1137, on whom also counsel relies clearly gives him no support, for he states quite plainly "I cannot say if there is now any bar to burning dead body on the old cremation ground", adding that "Hillmen still bury their dead bodies at any place of the cremation ground they like" (*Vol 11, p 303, ll 19-21*), which certainly does not show that Hindus were prevented from burning dead bodies there.

OLD SASAN STILL IN USE IN 1908

On the other hand, there is a large body of evidence on the plaintiff's side (partly referred to already) showing that both *sasans* were used simultaneously. Thus, to recall only a few of the witnesses, Durga Prasad Bashty, P W 964, says "There are two *sasans* at Darjeeling—one is to the north of the other and some distance off. Bodies are cremated at both places" (*Vol 11, p 54, ll 2-4*). Manmatha Nath Chowdhury, P W 986, again, speaking about his personal experience, states that until the new Sudhir Kumar Road was made he would cremate dead bodies in the old *sasan* (*ibid, p 279, ll 8-10*), his first visit to the new *sasan* being, as he says, in 1911 or 1912 on the occasion of the death of Mahendra Nath Banerjee (*ibid, p 281, ll 40-42*), which according to R N Banerjee took place on the 21st August, 1911 (*Vol 3, p 107, ll 1-2*).

Apart from all this, there is the evidence, as the learned judge points out (*Vol 18, p 372, ll 31-34*), of one of the defendants' own witnesses, Sarada Prasad Bhattacharjee, D W 402, retired Head Mohurr of the Burdwan Raj Estate at Darjeeling, who says "I first went to Darjeeling *sasan* 27 or 28 years ago in 1315 or 1316 B S" (which would correspond to 1908-1909), (*Vol 17, p 215, ll 39-40*) he was referring to the old *sasan* and not to the new, as the new Sudhir Kumar Road had not yet been made (*ibid, p 216, ll 1-3*), and as he also explained to the court (*ibid, p 216, l 14*). In his examination-in-chief he said "There was an old *sasan* after the new *sasan* was made", and then added, "upon that the old *sasan* was closed" (*ibid, p 208, ll 31-32*). In cross-examination he repeated the statement that the old *sasan* ceased to be used after the new *sasan* was made, but had to admit at once that this was only his guess and he had no personal knowledge on the point (*ibid, p 218, ll 3-5*).

On the defendants' side, there are two witnesses on whose evidence Mr Chaudhuri strongly relies, Frederick Lofts, D W 13 (*Vol 12, pp 401-408*), and James Emil Morgenstern, D W 398 (*Vol 17, pp 127-133*) Lofts, a retired Staff Sergeant, joined the service of the Darjeeling Municipality as Market Superintendent in April, 1907, and became Superintendent of Conservancy in November, 1908, which post he held till he retired in 1915 (*Vol 12, pp 401, ll 10-17*) As Conservancy Superintendent it was his duty to inspect burial grounds within the Municipality (*ibid, p 401, ll 21-24*) He knew the Hindu cremation grounds, both old and new, and saw the new one some months after he had joined as Market Superintendent (*ibid, p 402, ll 36-37*)

"Q—When you saw the new cremation ground, after that, where used the bodies of Hindus to be burnt?

A—On the pyre which the Engineer had made

Q—Was the old cremation ground in use in that time?

A—No

Q—Why?

A—Because the Vice-Chairman told me the old burning ground was not to be used any more and to inform the man in charge—the *dome*—that there be no more cremation there" (*ibid, p 403, ll 3-11*)

It is rather curious that if the Municipality wanted to close the old burning ground, it should not have followed the statutory provision of giving public notice of its intention to do so, and then after hearing objections, affixing on a conspicuous part of the ground itself a notification for its closure, as required by s 256 of the Bengal Municipal Act, 1884, which had been made applicable to Darjeeling by Bengal Act I of 1900 The defendants have given no evidence to show that any such procedure was followed, and I refuse to believe that the municipal authorities should have been content merely to give instructions to the *dome* in charge, through their Conservancy Superintendent Apart from this, it is not at all clear what means the witness had of knowing if cremations were not actually going on at the old *sasau* after the new one had come into use In cross-examination he admits that he had seen very few cases of death, and was speaking from memory (*ibid, p 404, ll 11-14*)

TUTORED EVIDENCE FOR THE DEFENCE FREDERICK LOFTS

A reference to other parts of his evidence will at once show that his memory for certain things was only too good He remembers, for instance, having "taken his hat off" to the second Kumar the first day he met him at the entrance of the glazed verandah in "Step Aside", he remembers the Kumar's "nodding back to him" and his saying, "if anything is required, kindly inform me" (*ibid, p 401, l 33—p 402, l 2*) He remembers meeting him again another day at the entrance of the house, this time in Jodhpur breeches, and asking, "Is everything right?", and being told in reply, "All right" (*ibid, ll 6-8*) Still another day he remembers seeing him mounted on a brown waler near his gate and wishing him "Good Morning", and then both riding up together to the top of the Rangit Road (*ibid, p 402, ll 12-15*) His recollection does not stop here he met the Kumar also at billiards at Jones' saloon, playing with Balen Banerjee (*ibid, p 402, ll 16-19*)

there was also another young gentleman with them, "of the same build as Balen", whom he had seen over and over again at Balen's house just above the meat market—presumably the Kumar's *fidus Achates* Satyendranath Banerjee (*ibid*, p 405, ll 20-23) He even remembers that the first day he met the Kumar and his companions at billiards, they played one game and retired (*ibid*, p 405, ll 37-38) He sat and watched other people play, but of course did not remember who played after the Kumar and his party had their game (*ibid*, p 406, ll 1-3), though he had a "clear recollection"—"clearest"—that he and his friend Mr Muccard left the billiards saloon before dinner hour, with Mr Dunn just behind them (*ibid*, p 406, ll 15-18) The second day he saw the Kumar and the other two—the same three—playing there, he went in and called for a glass of beer—of this he has "definite recollection", and he remembers also "distinctly" that he went home just after his glass of beer (*ibid*, p 406, ll 24-30) His recollection was obviously the clearest on points on which he knew contradiction was not possible Asked if he wished to say that he had a good memory, he very modestly replied "I can remember things, special things, from when I was five years of age" (*ibid*, p 406, ll 6-8), and as he explained, "the death of a Kumar is a special event, and if it gets with (*sic*) one's mind, one would remember that more than any other ordinary event" (*ibid*, p 407, ll 4-5) "Anything special in a Kumar saying something in English?"—"He spoke a few words, very few words, and that is the reason why I remember He would not speak long sentences" (*ibid*, p 407, ll 8-10)

It would tax the credulity of any court to place the slightest reliance on the testimony of such a witness, and speaking for myself, I have no hesitation in holding that it is tutored evidence almost from beginning to end

JAMES EMIL MORGENSTERN

As regards the next witness Morgenstern, he is a son of old Morgenstern who had his Vegetable Gardens in the cremation ground area and died on the 30th January, 1935 The witness was a boy of 9½ years in May, 1909, and yet we are asked to believe that he can give competent evidence regarding the use of the *sasans* about this time It is true that he came to live in this area in 1907 when his father built his new house "Emil's Cot", and was residing there since, but neither he nor his father had any concern with any cremation ground, and as he himself says, he never accompanied a Hindu funeral procession to the *sasan* (*Vol 17*, p 131, ll 29-30) He merely states that about a year after he came to this house he saw the new cremation ground put in use, but also admits having seen the old *sasan* since coming over here, and he adds "I cannot recollect how long the old cremation ground continued to be used, but I think it was used for a very short time afterwards" (*ibid*, p 128, ll 23-28) He agrees that Hindu gentlemen who used the old cremation ground as well as the new would know better when the former ceased to be used as burning ground (*ibid*, p 132, ll 13-15) It is difficult, therefore, to attach any importance to the evidence of this witness

He, however, produced a map which purported to be a "true copy" of a municipal plan of the Vegetable Gardens leased out to his father by the Darjeeling Municipality, bearing date 29th July, 1909, which, he says, correctly represents the things depicted on it as at that date (*ibid*, p 127, ll 29-31), and Mr Chandhuri points out that this map does not show the old *sasan*, though it indicates the site of the new cremation ground by the words "pyre shed" The map has not been legally proved the witness says

that he found it among his father's papers (*ibid*, p 127, ll 21-23), and professes to recognise the *facsimile* signature of the Municipal Engineer Robertson on it from the signature of this official which he had seen in other documents in his possession (*ibid*, p 127, ll 25-29) It was only marked for identification, and will be found among the unexhibited documents in *Appendix Volume*, p 195 Even if the map is admissible, I do not think any conclusion can be drawn from the mere fact that the site of the old *sasan* is not depicted in it

In my opinion, there is nothing whatever in the evidence to show that the old *sasan* was not or could not be in use in May, 1909, merely because the new *sasan* had come into existence in August, 1907, and it is not possible to reject the plaintiff's story of the evening cremation on this ground any more than on the ground that the cremation party did not betake themselves to the new *sasan*, equipped as it was with a proper shelter which promised them safe cover against inclement weather

As I have already indicated, the condition of the weather alone might afford a simple and sufficing explanation for stopping short at the old cremation ground, even if the new *sasan* he supposed to have been their original destination, but apart from this, there might still be very good reason for avoiding the new *sasan*, partly because of the dark night and partly because of the difficulty of the approach to it If the plaintiff's evidence of rain and storm is accepted, that would only furnish an additional reason Rain and storm failing, his case will of course wholly fail

JHORA BETWEEN OLD AND NEW SASAN

The evidence on the plaintiff's side is that there was not even a defined foot-track from the old to the new *sasan* at the time, the whole of the way between the two was covered with jungle, and the gradient was steep, and besides this there was a *ghora* or a sort of a ravine crossing the path The old Sudhur Kumari Road, which was called a road only by courtesy, as recorded in the report of the Hindu Burning and Burial Ground Committee, *Ex Z* (134) (*Vol I*, p 104, ll 25-26), stopped short at the old *sasan*, and it was not until 1912 that it was improved and continued southwards past the new *sasan* as the new Sudhur Kumari Road, after which the old *sasan* was practically abandoned

It is sufficient to give only a few relevant extracts from the plaintiff's evidence on the point —

(1) P IV 960, *Moni Mohan Sen Gupta* (*Vol II*)

"The new *sasan* was 300 to 400 feet from the old *sasan* Between the two there used to be jungle in my time The Sudhur Kumari Road was very narrow, very steep, with steps at points and made very uncomfortable going There were no lights in that road in my time" (p 37, ll 9-12)

"To the south of the 'existing flat' and between that and the new flat is shown a *ghora*—a small *ghora* By it water passes out in the rainy season The rainy season in Darjeeling is from the end of April to August" (p 36, ll 21-24)

(*In cross-examination*)

"Q—One can walk from the old *sasan* to the new?

A—No, except by the Sudhur Kumari Road

Q—What would prevent one?

A—Jungle and slope

Q—By 'jungle' you mean 'shrub'?

A—Yes

Q—By 'slope' you mean lower—that the new sasan is lower in level?

A—There was no communication or foot-path—the depths between are sheer at places I cannot tell the gradients" (p 37, l 36—p 38, l 8)

(2) P W 963, *Indra Shing Satri*, (Vol 11)

"To the north of that sasan was the old sasan and between the two a small jhora Between the two is jungle also, dwarfish hilly jungle—about 5 or 6 feet high" (p 50, ll 9-11)

(In cross-examination)

"The old sasan is 50 feet from the new sasan as a crow flies, and if you go by the road, about 300 feet Between the two runs a narrow zigzag road

To Court

"It is wide enough for a single man to pass Two cannot go abreast In the small jhora a little water trickles It is not even a foot deep and the depth of the flowing water is an inch or half an inch The jhora still exists" (p 51, ll 9-15)

(3) P W 967, *Ram Sing Subha* (Vol 11).

"Between the two sasans was a jhora which was across our way It was difficult crossing with the dead-body at the time I spoke of At that time the new sasan was not visible from the old On the other side of the jhora as one goes to the new sasan, the land is now better as landslips brought some earth down there The jhora is now narrower than it used to be" (p 69, ll 14-20)

(4) P W 968, *Chandra Singh* (Vol 11)

"Road to the new sasan was very bad there was no road but foot-path and at a point was a slope—one has to descend and ascend" (p 87, ll 3-4)

(In cross-examination)

"In 1909 the way to the new sasan from the old was not even a regular track—not clear at points either Not even as good as a 'chor bato' A 'chor bato' is used as a short-cut by hillmen and is generally very steep and very bad By 'bad' I mean 'impossible to pass'" (p 92, ll 28-32)

(5) P W 979, *Laksmi Chand* (Vol 11)

"To go to the sasan a new road has been built—this was built 20 or 22 years ago Before this road was made, dead bodies were burnt at the old sasan as well as the new, as it was more difficult to go to the new sasan than to the old and the road was very bad and there was jungle including sasan nettle" (p. 242, ll 36-40)

(6) P W 983, *Santa Bir Singh* (Vol 11)

"At first there was the old *sasan* and the road to it very bad"
(p 260, ll 21-22)

(7) P W 986, *Manmatha Nath Chowdhury* (Vol 11)

"In those days it was difficult to go to the new *sasan* at night, as one had to get down into a *ghora* and then to get up the other side The Sudhir Kumari Road along which we took the corpse was difficult road and at points two people could not go abreast There was electric light up to the *Butcher bustee*, not up to the *sasan*" (p 277, ll 18-19 and ll 21-23)

"The sides of the *ghora* on one's way to the new *sasan* were jungly" (p 279, l 15)

(8) P W Kazi Samsuddin Ahmed (on commission) (Vol 11)

"The Old Sudhir Kumari Road was very narrow Very often in some places it would be very inconvenient for two persons to proceed together with any dead body by that road In the rainy season, it was very inconvenient" (p 301, ll 25-28)

"There is a streamlet between the old and the new cremation ground If one has to go to the new cremation ground *via* old Sudhir Kumari Road, one would have to go after crossing that aforesaid streamlet There was no bridge over that streamlet Two sides of the streamlet are high and in the middle there was a hollow One would have to go to the new cremation ground on descending from the upper side and again on making an ascent Some places of the streamlet were wet, somewhere there was 6 to 8 inches of water and somewhere it was dry Water was not "stained" (sic, would not stand?) anywhere Water would flow down from upper surface Water would increase if there were rains, and there would be mud, and water would flow down in stream gradually Old Sudhir Kumari Road has shrubs not only near about the place of the streamlet, but on two sides thereof throughout There were plants called *shishnu* and *achhalla* (*nettle*) At present the streamlet has been filled up to some extent by landslide from above" (p 302, l 37—p 303, l 13)

This body of evidence practically remains unchallenged, and neither the map of the cremation grounds, *Ex 36* (*Map No 1 in the Book of Maps*), nor the map of Morgenstern's Vegetable Garden, *Ex 411* (*Map No 3, ibid*), lends any support to Mr Chaudhuri's suggestion that there was no *ghora* between the two *sasans* Morgenstern himself admits that "between the two there was a narrow ravine or defile as I described the *ghora* and there was scrub" (Vol 17, p 130, ll 22-24), and in fact showed the position of the *ghora* in his map at the point marked "W", saying that "during a heavy rain-storm you have a streamlet running down this channel" (*ibid*, ll 36-37)

GOOD REASONS FOR AVOIDING NEW SASAN

Learned counsel lays stress on what is admittedly a fact that the morning cremation took place at the new *sasan*, but it was never the plaintiff's case

that this cremation ground was altogether inaccessible, specially during day time on the other hand, some of his witnesses quite frankly stated that they had attended day cremations at this site even before the new Sudhūr Kumārī Road was made, as, for instance, on the occasion of the death of Mahendra Nath Banerjee, the Government Pleader. It does not follow that there would be any improbability in a funeral party choosing the old *sasan* rather than the new for a night cremation, particularly in the kind of weather which is said to have prevailed on the night of the 8th May.

Neither can any inference adverse to the plaintiff's case be drawn from the fact that the rescuing sadhus might have crossed the *jhora* between the two *sasans* that very night. The plaintiff's evidence is not that the *jhora* was impassable—it might be only a little streamlet, with no large volume of water flowing through it except probably during rain, but the whole question is whether or not the fact that it was there, coupled with the actual condition of the track and the surrounding area, might not be a reasonable enough ground to dissuade a night cremation party from going to the old *sasan*.

SUPPOSED ABSENCE OF HUTS AND SHEDS FOR SHELTER

The next question to be considered is about the huts or sheds in which the evening processionists are said to have found shelter during the rain and storm. The evidence on the point may be briefly collated for the sake of easy reference.

(1) *Sitanta Kumar Bagchi (on commission) (Vol 2)*

Went into a small shelter with tin roofing, no enclosure, but bench within it, more than a mile off from the *sasan* (p 436, ll 9-13) dimensions about 8 or 10 cubits by 5 or 6 cubits (p 458, ll 20-21) speaks of a segregation camp at a higher level, about 1000 or 1200 cubits off, but did not take shelter in it as persons suffering from infectious diseases stayed there (p 456, l 24—p 457, l 8 and p 459, ll 17-21)

(2) *P W 941, Kiron Mustafa (Vol 10)*

Got into a shed near a slaughter house (p 384, ll 4-5), about a quarter of a mile off (*ibid*, l 40) no cross-examination regarding dimensions or other particulars

(3) *P IV 947, Jatindra Chandra Chakravarti (Vol 10)*

Took shelter in "a slaughter house" above the *sasan* it was a *ghar*, a shed (p 240, ll 12-15) only cross-examination—10 or 15 minutes' ascent from the *sasan* (p 424, ll 8-10)

(4) *P IV 986, Manmatha Nath Chowdhury (Vol 11)*

Left the *sasan* within a few minutes of his arrival, and encountering rain on the way back a little below Morgenstern's garden—within the garden itself—took shelter in a shed there (p 277, ll 23-24 and 31-33) shed was near present slaughter house in the shed no slaughter used to take place then, but probably there was a slaughter house below the present slaughter house did not exist where it is now (*ibid*, ll 34-38) going along the old Sudhūr Kumārī Road to the new *sasan*, the shed would be to the left, and a Mahomedan Burial Ground to the right (p 279, ll 17-20) from the *sasan* to the shed, going up-hill, it might take 15 to 20 minutes (p 280, ll 39-40) it was the first shelter, as one came from the old *sasan*

no other shelter near about except higher up no further shelter down the *sasan* to his knowledge it was probably a *nah's* shelter—did not know whether it was Morgenstern's went up a sort of pathway to the shed by the side of a garden shed was open on all sides (p 281, ll 14-25)

NON-EXISTENCE OF NEW SLAUGHTER HOUSE

It will be seen that none of the witnesses speak of the new slaughter house, which, it is in fact admitted by P W 986, Manmatha Nath Chowdhury, giving evidence on the 19th December, 1934, did not exist there in May, 1909 (Vol 11, p 277, ll 37-38). The plaintiff, through his witness Kazi Samsuddin Ahmed, who was examined on commission on the 26th and 27th December of that year, actually proved certain correspondence between the Hindu Burning and Burial Grounds Committee and the municipal authorities, showing that the new slaughter house was constructed somewhere about August, 1911 (see Ex 415, Vol I, p 150 and Ex 416, *ibid*, p 154, ll 31-34).

To prove the date of its construction, the defendants need not have put in, as they did two years later, the official records from the Darjeeling Municipality (Ex Z (356) series, *ibid*, pp 464-493). This evidence, however, is useful as showing that there was a slaughter house in this area before the new one came into existence, which had to be demolished only in or about June, 1909, on account of a landslip caused by heavy rains in that month (Ex Z (356) *ibid*, p 466, office copy of a letter from the Vice-Chairman of the Municipality to the Sanitary Commissioner for Bengal and the Sanitary Engineer, Bengal). The "last heavy rains" in this letter cannot obviously refer to the rains of June, 1908, as Mr Chaudhuri would like to say in order to obliterate all traces of a slaughter house in this locality in May, 1909, forgetting that his own witness Morgenstern, D W 398, clearly stated that in 1909 there was a slaughter house in the northernmost section of the old Mahomedan cemetery facing Jail Parade Ground (Vol 17, p 128, ll 13-15), and that to get to it, one would walk up the old Sndhir Kumari Road through the northernmost patch of his father's Vegetable Garden and up as far as the top-end of the said cemetery and down to Slaughter House Road (*ibid*, p 129, ll 1-4).

This slaughter house is in fact shown on the map the witness produced (*Appendix Volume*, p 196), bearing date the 29th July, 1909, which alone should put a quietus to Mr Chaudhuri's suggestion that the old slaughter house had been pulled down in 1908.

As regards this map, it may be pointed out in passing, that, as already stated, it was not admitted in evidence by the trial judge, not having been strictly proved, but on the defendants thereupon calling for the original from the Municipality, they sent in certain blue prints which were said to be replicas of the original, and these have been marked as exhibits J E M. 1-4 in this court by order dated the 20th February, 1939.

It appears that proposals for re-building the slaughter house at a new site started in the month of June, 1909, as is evident from Ex Z (356) (25) (Vol I, p 465), and the Hindu Burning and Burial Grounds Committee were consulted in the matter in November, 1909 (see Ex Z (356) (3), *ibid*, p 477, read with Ex Z (356) (2), *ibid*, p 473, margin, ll 25-31). It further appears that some portions of the lands leased out to Morgenstern for the Vegetable Gardens were resumed from him by the Municipality for the purpose, in spite

of his protest (see the Vice-Chairman's notice to Morgenstern dated the 14th July, 1910, Ex Z(356) (5), *ibid*, p 478, and a subsequent letter to him from the Chairman dated the 7th February, 1911, Ex Z(356) (20), *ibid*, p 486)

Morgenstern indicated the proposed site of the new slaughter house as the green plot in his map at the top of the big patch marked "Y"

Kazi Samsuddin Ahmed, who, as stated above, proved the correspondence referring to the new slaughter house, said in examination-in-chief that so far as he remembered, it was constructed in the year 1907 or 1908 (Vol 11, p 302, ll 5-4) This was evidently a mistake on his part, and not a deliberately false statement, as Mr Chaudhuri supposes, for the plaintiff was not at all concerned to make out the existence of the new slaughter house in May, 1909 The learned judge has quite correctly accepted the evidence of Manmatha Nath Chowdhury on the point (Vol 18, p 373, l 7)

It is quite clear that the non-existence of the new slaughter house does not destroy the evidence of any of the plaintiff's witnesses of the evening cremation Two of them, Kiron Mustafi and Manmatha Nath Chowdhury, only speak of going into a shed near a slaughter house, while two others, Jatindra Chandra Chakravarti and Chandra Singh say that they took shelter in a slaughter house There is nothing in the evidence of any of these witnesses to show that the slaughter house they were speaking of was not or could not be the old slaughter house

As to whether apart from the slaughter house, there were any huts or sheds near about, which might have afforded shelter, it is useless to argue from Morgenstern's map that no such huts or sheds existed, or to refer to Morgenstern's evidence that there were no sheds or huts in his father's Vegetable Garden, but only a number of glass-houses and conservatories, two in the lowest patch and two in the central patch, which would remain open only up to 4 or 5 P.M., besides the Municipal Magazine for storage of explosives, which was always under lock and key There is nothing to show the purpose for which the map had been prepared, and even if it be assumed that it was the plan which was forwarded to his father with the notice of the 14th July, 1910, showing the area which it was proposed to take over from him for the purpose of the new slaughter house (Vol. I, p 178), there is hardly any reason why it should show all the small huts and sheds in the garden Secondly, Morgenstern himself admitted that there were servants' quarters in this area in 1909, by which he meant quarters of *malis*, servants and syces, which according to him were situated about 20 or 30 yards north and west of "Emul's Cot" (Vol 17, p 132, ll 27-28), and east and south of Sudhur Kumari Road, and were made of corrugated sheeting and plain sheeting (*ibid*, p 133, ll 11-16) Manmatha Nath Chowdhury as well as the other witnesses might easily have been referring to one or more of these *malis'* sheds

The fact that none of them sought shelter in the rest house at the new *sasan*, seems to me to be of no consequence whatever In my opinion, the learned judge came to a right conclusion on the question of shelters, and I hold that there is no substance in the point raised by Mr Chaudhuri

5 ALLEGED RAIN AND STORM ON THE NIGHT OF THE 8TH MAY

It is necessary now to examine the question of rain and storm during the night of the 8th May, which I have indicated as a separate section in the Darjeeling chapter There can be no doubt that it constitutes the crux

of the plaintiff's case, as this is supposed to have led to all the untoward developments which resulted in the escape of the second Knmar from the funeral pyre. If the plaintiff's case is true, it was literally a miraculous escape, but the very first circumstance which rendered the miracle possible was certainly not of an exceptional character. At a place like Darjeeling, the season being the month of May, for the weather to be suddenly assuming a violent aspect so as to put people to flight for shelter, is after all not such an extraordinary phenomenon as to be unbelievable.

VALUE OF ORAL TESTIMONY

The question is whether the persons who speak to such weather conditions having actually prevailed on that particular night can be believed.

Oral testimony as to what the weather was like on a given day or at a given hour 25 years ago has in it an inherent element of uncertainty, which no court can possibly leave out of account. "It may be," as De Quincey observes, "that there is no such thing as forgetting possible to the human mind: a thousand accidents may and will interpose a veil between our present consciousness and the secret inscriptions on the mind: accidents of the same sort will also rend away this veil: but whether veiled or unveiled, the inscription remains for ever." It all depends, however, on whether the original inscription was a deeply imprinted image on the tablet of memory, or only a fugitive shadow lightly floating away across the surface like a film of mist.

To carry a dead body to the cremation ground in the valleys of Darjeeling during the dark hours of the night, and then to miss it, while away for a time, driven off the spot by a terrific onset of rain and storm, is an unforgettable experience, and the picture of it in its broad outline is not likely to fade away from the mind, though memory may perhaps unconsciously add a stroke of light here or a touch of shade there.

This is a psychological truth borne out by human experience, and should provide a key to a proper appreciation of the oral evidence on either side regarding the state of the weather on the 8th May, 1909.

EVIDENCE OF DEFENCE WITNESSES

Mr Chaudhuri's complaint is that the learned judge ignores the large body of evidence on the point coming from the defendants' witnesses, to which he gave the following references —

D W 7, Bibhabati Devi (Vol 12, p 205, ll 20-21)

"On Monday we started from Darjeeling after mid-day. On the preceding Saturday night there had been no rain or storm."

D W 380, Satyendra Nath Banerjee (Vol 16, p 430, ll 42-43)

"On the night of the 8th the weather was fair. There was no rain or storm that night."

D W 365, Dr Ashutosh Das Gupta (Vol 16, p 244, ll 30-31)

"On the night on which the Knmar died the weather was good. There was no storm or rain."

Shyamadas Banerjee (on commission), (Vol 1, p 258, ll 1-2)

"There was no storm or rain in the morning of that day The night before that day was also clear "

Rajendra Nath Sett (on commission), (Vol 1, p 302, ll 27-30)

"The day on which Kumar's body was burnt, that was fine weather The night before that day was also a fine one If there was any trouble, I would have remembered that If I were wet, then I would have remembered it "

Mohendra Nath Banerjee (on commission), (Vol 1, p 324, ll 24-25)

"The day (9th May) was similar to this, it was very clear and bright I was awake from the evening up to till 1 A.M. at night The weather was very fine up to then "

Kalpada Motia (on commission), (Vol 1, p 350, ll 4-5)

"There was very fair weather on that day (9th May), as fair as today "

Jagat Mohini (on commission), (Vol 1, p 283, ll 14-17)

"The night in which the Kumar died was a very clear night We were sitting up with the dead body throughout the whole night The next day when the dead body was burnt was a very clear day It was a day as clear as this day "

Anthony Morel (on commission), (Vol 2, p 369, ll 14-17)

"The day on which the dead body of the Kumar was burnt was fair The day was fair, there were no clouds and no rains The night on which the Kumar died was also fair There were no storms and no rains "

D W 140, Bepin Behari De (Vol 14, p 492, ll 36-37)

"On the night of the Kumar's death the weather was good There was no storm or rain "

D W 290, Barendra, Chandra Banerjee (Vol 15, p 321, l 17)

"The weather was very 'fair' on Saturday night "

Calvert (on commission), (Vol 2, p 204, l 33—p 205, l 2)

Q —Do you remember what the weather was like on the night the Kumar died?

A —To the best of my recollection it was fine up to the time when I went to bed

Q —Would that be before or after the Kumar's death?

A —Some time after the Kumar's death when I went home—after the usual condolences to the members of the family

Q —You do not know of it having rained that night?

A —No "

NO PARTICULAR REASON FOR REMEMBERING

On the defendants' evidence it does not appear that there was any particular circumstance at the time or later to have directed attention to the condition of the weather If, as the plaintiff says, there were rumours

shortly after the Kumar's supposed death regarding a hitch in the cremation, that might perhaps have made it important to remember whether there was any storm or rain which could have produced such a consequence, but as we know, the story of such rumours is strenuously denied by the defendants. So far as the Kumar's own people are concerned, the fact of his death, under circumstances of such tragic suddenness as they allege, at a place like Darjeeling, far away from his home, may no doubt be supposed to leave a lasting impression on their minds, but is it likely that during the most anxious hours they would be passing through on that fateful night, according to their story, watching the Kumar in his last gasp, their thoughts would turn to the condition of the weather outside rather than to that of the patient within? The defendants do not suggest that if there was rain or storm that evening, there were any incidents in the course of the Kumar's illness at the time which would make them remember the fact none of the inmates of "Step Aside" even say that if it had rained, they were not likely to forget. The statements these witnesses make are no more than a bare denial of the plaintiff's case, and this is in fact carried to the extent of outsiders like Shyamadas Banerjee, Rajendra Nath Sett and Tinkari Mukerji, who must have been sleeping peacefully in their beds at least up to 1 A.M., being made to say that it was "fine" weather through the whole of that night.

DIFFERENCE IN THE CASE OF PLAINTIFF'S WITNESSES

On the other hand, the plaintiff's witnesses who speak of rain and storm, not only those who were present at the *sasan*, but the persons who saw the evening procession, have this in their favour that the rain and storm are inseparably connected in their minds with one of the strangest events within their knowledge or experience. The outstanding fact which would indelibly impress itself on their memory would be that of a sudden heavy squall as being directly responsible for all the extraordinary sequel they witnessed or heard of, and no lapse of time could efface their recollection of it, though the very intensity of the impression might not unnaturally perhaps make them magnify the severity of the weather on the occasion, in trying to recall the fact 25 years later.

In my opinion, in weighing the oral evidence on both sides regarding the rain and storm, the scales must inevitably turn in favour of the plaintiff, and I do not think it would be right to make too much of any exaggerated statements that may have been made by his witnesses as regards the precise duration or extent thereof.

I have already referred to a large body of witnesses on the plaintiff's side who give direct evidence on the point, but there are a few others to whose evidence it is also necessary to call attention as equally cogent and important.

PLAINTIFF'S EVIDENCE WEIGHED

The first is Madhu Sudan Mukherjee, P.W. 807, (Vol. 9, pp. 316-318), who is supposed to have made a previous statement before a magistrate at Patna (*Appendix Volume*, p. 206) as already noticed in connection with the question of one or two *sasans* at Kaghjhora. He was an assistant in the Political Department of the Government of Bengal and moved up to Darjeeling with

the Secretariat during the summer of 1909 (April to June) He was staying with some fellow officers at a mess in Bhutia Bustee down Rangit Road, and specifically names Anukul Chatterjee *akas* Fatik (Vol. 9, p. 316, l. 20 and l. 38) as one of his mess-mates who lived in the same room with him. He speaks of Suryanarain Mukherjee coming to the mess one evening after dusk to call Anukul to carry the dead body of the Kumar to the cremation ground. Anukul, it is said, went, returning late at night, it might be midnight or later. Witness got up from his sleep when Anukul returned, and found him "drenched from head to foot" (*ibid*, ll. 36-37). Questioned in cross-examination regarding his previous statement before the Deputy Magistrate, he said

"The only question I remember is that he asked me if it rained on that day, and I said that Anukul Babu came back drenched from head to foot" (*ibid*, p. 317, ll. 15-16)

Asked if he had stated that Anukul came back probably at dusk or just before dusk, he said

"I remember he came back at night" (*ibid*, l. 30)

It was put to him that Anukul did not live with him at Bhutia Bustee but in the Cutchery Building, and he replied in the negative (*ibid*, p. 318, ll. 7-9)

STORY ABOUT ANUKUL CHATTERJEE

If this story of Anukul Chatterjee coming back to his mess at night "drenched from head to foot" is true, there can be no doubt that it gives most convincing support to the plaintiff's case. Mr Chaudhuri's attempt to falsify this evidence by referring to the so-called previous statement of the witness is futile, for, for reasons already explained, I entirely agree with the learned judge when he says that this statement is neither proved, nor purports, to be his (Vol. 18, p. 362, ll. 18-19)

The defendants seem to have been anxious from the beginning to annex Anukul Chatterjee for the morning procession, he being a man of Uttarpara, the place from which Satyendra hailed, but unfortunately, it appears, their anxiety over-reached itself, producing different stories from different witnesses

CONFLICTING DEFENCE VERSIONS

Their very first witness Shyamadas Banerjee (Vol. 1, pp. 263-278), also a man of Uttarpara, said that as soon as he received the news of the Kumar's death from Satyendra at about 1 or 1-30 in the night, he at once started for "Step Aside" with "another boy named Anukul Chatterjee", who was staying with him at Cutchery Building (*ibid*, p. 256, ll. 13-14). There were several other Secretariat clerks staying there at the time, but he gave the news only to Anukul Chatterjee and two others, who, it so happens, have all died since. He did not ask any of these persons to go for the cremation, as such a thing was "impossible" at a place like Darjeeling at that hour of the night. Anukul, however, went with him, and appears to be the only one who did so according to the witness (*ibid*, p. 269, ll. 11-17)

Rajendra Nath Sett (Vol. 1, pp. 300-313), the next Uttarpara witness, who was examined only a few days later, would not, however, give Shyamadas Banerjee the credit of taking along this young man to "Step Aside". He

got the news of death the same night at the Sanitarium, and although not asked by Satyendra to do so, thought it right to call at the Cutchery Building on his way, presumably because "some men of Uttarpara used to live there" (*ibid*, p 301, ll 13-16). He cannot say exactly how many came out from this mess, probably six or seven did he remembers, however, Shyamadas was not one of them, but mentions, without naming, "that tall man", an acquaintance of his (*ibid*, p 303, ll 25-30), whom he referred to earlier as "another tall gentleman of Uttarpara who worked in the Secretariat", and who is supposed to have brought down, with Shyamadas, the dead body from upstairs at "Step Aside" (*ibid*, p 301, ll 33-35)—thereby clearly identifying him as Anukul Chatterjee, it not being the defendants' case that any other Secretariat clerks belonging to Uttarpara were at "Step Aside" that morning.

According to Rajendra Nath Sett, two other persons from the Sanitarium, Bjoy Krishna Mukherjee (*Vol 1, pp 314-321*) and Tinkari Mukherjee (*Vol 1, pp 433-461*), went along with him that night (*Vol 1, p 301, ll 12-15*), but none of them speak to picking up Anukul Chatterjee on the way, Tinkari Mukherjee in fact stating that he went the following morning (*ibid*, p 434, ll 16-17 and l 22).

Mohendra Nath Banerjee (*Vol 1, pp 323-345*), another defence witness, examined at about the same time, gives an entirely different version. He was also an inmate of Cutchery Building, and his story is that he returned to his mess very late that night from an invitation, and heard of the report which Shyamadas Banerjee had received of the Kumar's death, but he did not feel disposed to stir out at that hour. Shyamadas Banerjee came back the next morning, when about 8 of them went from there, including Anukul Chatterjee, whose name he remembers (*ibid*, p 323, ll 20-34), though somewhat inconsistently he says later that Anukul Chatterjee was one of those who had gone to "Step Aside" that morning before him (*ibid*, p 327, ll 7-10).

Yet another defence witness, Kali Pada Moitra (*Vol 1, pp 347-362*), who received the news of death from Shyamadas Banerjee "very early in the morning" (*ibid*, p 348, ll 9-11), speaks only of having noticed Anukul Chatterjee at "Step Aside" bringing down the dead body from upstairs (*ibid*, p 348, ll 34-36).

The next defence witness from the Cutchery Building, Kana Ram Mukherjee (*Vol 1, pp 363-375*), however, proved distinctly disappointing. He gave the names of several persons who were staying at this mess, such as Mohendra Nath Banerjee, Lal Behary Mukherjee, Kali Pada Moitra and Nalindra Nath Ghose, but did not remember "whether or not any one by the name of Anukul Chatterjee used to stay there", adding "most probably he did not stay there" (*ibid*, p 363, ll 26-30). According to him Anukul and Shyamadas came round in the morning at about 6 or 6-30 to call people for the cremation, and the witness was one of those who went (*ibid*, p 364, ll 21-24).

It will be seen that the whole foundation of this body of defendants' evidence respecting Anukul Chatterjee, which was all given on commission, was the fact of his staying at the Cutchery Building, and not at the Secretariat clerks' mess in Bhutia Bustee, as deposed to by P W 807, Madhu Sudan Mukherjee, giving his evidence in Court.

SUPPOSED CORROBORATION BY KALIDAS PAL

Mr Chaudhuri sought to obtain corroboration of this fact from the evidence of Kali Das Pal, who was in fact the first witness on the plaintiff's

side belonging to the Cutchery Building group and was examined on commission at a fairly early stage in the case (*Vol 2, pp 127-132*) It will be remembered that Mr Chaudhuri accepts the evidence of this witness, except only as regards the time when the news of death is supposed to have been received at this place, which counsel suggests he put by mistake too early as 9 or 9-30 P.M. (*ibid, p 127, ll 26-33*), though he had mentioned the very same hour in his previous statement to Lethbridge in the course of the Landsay enquiry (*ibid, p 128, ll 5-9, see also Vol II, p 243 and p 252*)

Kali Das Pal does not mention the name of Anukul Chatterjee in his examination-in-chief, and it is not shown that he had given it in his previous statement either. The witness did not go to the cremation even the following morning, but says that his friends went (*Vol 2, p 128, ll 17-19*), upon which follows this cross-examination

"Among my those friends, Mohendra Nath Banerjee was also there I have my doubts as to whether late Lal Behari Mukherjee attended the cremation. But Mohendra Nath Banerjee did attend the cremation" (*ibid, ll 21-23*)

Then comes this answer in the very next line

"I do not remember if Anukul Chatterjee attended the cremation". (*ibid, l 24*)

This is the only reference made by the witness to Anukul, and I for one fail to see how this can be construed as an admission that Anukul was one of the "friends" who were stopping at Cutchery Building. The answer was obviously given to a question as to whether Anukul attended the cremation, without any reference to the place where he was staying, and thus will be evident from the fact that in respect of several other persons about whom he was asked immediately afterwards, such as Kshetra Mohan Bhattacharya, Kanai Mukherjee, Shyamadas Banerjee and Kali Pada Moitra, he was expressly questioned whether they were living in the Cutchery Building at the time or not.

PANCHANAN MOITRA'S STORY

The defendants afterwards called a witness, Panchanan Moitra, D.W. 113, to prove that Anukul Chatterjee did not live at Bhutia Bustee in May, 1909 (*Vol 14, pp 364-372*). The witness admits that he came to give evidence only for this purpose. One Romesh Babu, a perfect stranger to him, comes to him one day at the Secretariat and asks if he had gone to Darjeeling in 1909. On his saying "yes", he is next asked if he stayed at "Lama Villa", that being the name of the Bhutia Bustee mess. He says, "yes" again, and feels curious to know why he is being put these questions. He is then asked, "Did Anukul Chatterjee stay there?" He says "No". Thus was practically the whole of the conversation between the two.

"Q—Did he ask about Anukul Chatterjee alone?

A—Cannot remember

Q—Did he ask about Madhusudan Mukherjee?

A—Perhaps he did, I remember now. These two persons—I remember now. He asked about nobody else" (*ibid, p 367, ll 6-21*)

The witness must have had a wonderful memory. He said there were 8 clerks staying at this place at the time, of whom he gave the names of four, besides himself the other three he did not remember—"so many trips occur, how could anybody remember?" (*ibid*, p 364, ll 28-33). Precisely, but he still remembered enough to be able to say that Anukul Chatterjee was not there in the first trip of 1909! The witness knew Rajendra Sett of Bally, but was quite innocent of the name of Satyendra Nath Banerjee. He did not even know that Satyendra had any connection with this case (*ibid*, p 366, ll 1-15)! He had very short evidence to give, but still it took more than an hour to give his statement to defendants' lawyer Pankaj Babu (Pankaj Kumar Ghose, Advocate). It is a bit disconcerting to find, however, that giving evidence only two days later, he did not remember if the lawyer asked him whether Madhu Sudan Mukherjee had been living with him at Bhutia Bustee in the first trip of 1909 (*ibid*, p 366, ll 30-37).

Speaking for myself, I find it difficult to place any reliance on the negative recollection of such a witness, notwithstanding his claim that his memory "may fail on minor points but not generally on important points" (*ibid*, p 368, ll 22-23). He had given a statement to Lethbridge, but it does not appear he then mentioned any of the "important points" which he afterwards came to give in his deposition in court.

In my opinion, it is not established that Anukul Chatterjee was living at the Cutchery Building mess in May, 1909, and in concurrence with the trial judge, I am inclined to believe Madhusudan Mukherjee, whose recollection is in fact bound up with a specific incident, which can hardly be predicated of the witnesses on the other side.

CORROBORATION OF PLAINTIFF'S VERSION

His evidence receives substantial corroboration from another witness of the plaintiff, Jnanendra Nath Banerjee, P.W. 838, (*Vol 9, pp 426-431*), who lived at the time at Balu Villa No 1 at the back of the Government Pleader's house, and was an active member of the Amusement Section of the Club at the Nripendra Narain Public Hall, where he would be present almost every evening till about midnight and sometimes later. He remembers the evening when somebody came there at about 7-30 or 8 P.M. with the news of the Kumar's death, to call men for the cremation. He did not go, as he was due to leave for Kurseong the next morning for the Kakina *svadhi*. He has good reason to recall this fact, because of an interesting incident which happened that night. As he was changing on return from the club before retiring to bed, he saw Anukul Chatterjee whom he knew from before, climbing up some steps to get into a road higher up in front of his house. Anukul saw him, and called out "Jnan Da". He went out and found him "very much drenched", and asked where he had been at that hour of the night.

"Q—What did he say? (*Objected to Allowed*)

A—He said he had gone to cremate Bhowal Kumar, but his body was missing and so he was coming back."

He adds

"I did not believe him and thought he was talking nonsense and asked him to go home.

I have no independent recollection of there being a rainfall that night" (*ibid*, p 427, ll 1-15).

The cross-examination was directed to showing that he had not given this story in his statement to N K Roy on the 2nd June, 1921 (*Ex Z(43)*, Vol II, p. 235). As will be seen, however, this statement consisted only of answers to such questions as had been put to him. At that stage, it will be remembered, no questionnaire had been prepared, neither the one of Rai Bahadur Sasanka Coomar Ghose (*Vol I*, p. 240), nor that of R C Datta (*ibid*, p. 246), and still it was sought to mislead the witness by suggesting that he had been put the specific interrogatories in the later questionnaire. It is not surprising that the witness was in fact misled, and attempted an explanation by saying that he did not mention the incident in answer either to Q 8 or to Q 9, because the fact of Anukul having gone to the cremation was not within his personal knowledge (*Vol 9*, p. 428, ll 21-26 and ll 29-34). Counsel taunted him with giving a lawyer's excuse because what Anukul said was "hearsay" (*ibid*, ll 27-28), and in fact asked if he had read the law (*ibid*, l 35). All this taunt notwithstanding, the evidence of this witness, however, remains wholly unshaken, and I see no inconsistency between his present deposition and his previous statement. Mr Chatterjee admits that if Anukul Chatterjee was living at the Cutchery Building, and not at Bhutia Bustee, he would not be passing Jnanendra Nath Banerjee's house.

DEFENCE CASE GIVEN AWAY BY THEIR WITNESS—FAKIR ROY

Long before Madhu Sudan Mukherjee came into the box, Fakir Chandra Roy (*Vol 3*, pp 1-15), examined by the defendants on commission, had already given away their case regarding Anukul Chatterjee. Fakir Chandra Roy, it will be remembered, had been cited by the plaintiff as early as the 26th February, 1931, and was in fact mentioned by Sitanta Kumar Bagchi, who gave evidence on the 26th and 27th June, 1932, as one of the persons present at the evening cremation. Quite unexpectedly, however, he was taken by the defendants before a Deputy Magistrate at Darjeeling on the 19th September, 1932, to give a statement on their behalf (*Ex Z(364)*, Vol II, p. 266), and then produced as a witness before a Commissioner on the 16th October following. The object evidently was to falsify the evidence of Sitanta Kumar Bagchi by getting him to say that he did not go to the cremation ground at all, whether at night or during the day. In this they succeeded, for he said he merely saw the morning procession between 9-30 and 11 A.M. and did not attend any cremation (*Vol 3*, p. 2, ll 9-17), but they were evidently not prepared for what he gave out about Anukul Chatterjee in cross-examination. He was asked if he had any talk with Anukul about the Kumar before he saw the procession, and he said—

"Whether it was before or after—that I do not remember, but that Anukul Babu told me that *he went to burn the Kumar the night before*. For that reason he felt pain in hands and feet and all over his body. I remember ("think" is not a correct translation) Anukul Babu told me this" (*ibid*, p. 7, ll 16-22).

This led to a remarkable re-examination which only served to bring out that his conversation with Anukul gave him the idea that he had gone to the cremation ground "probably" between 10 or 12 o'clock at night (*ibid*, p. 14, l 13).

"INCREDIBLE" RE-EXAMINATION

The cross-examination also elicited from the witness a piece of significant evidence regarding the weather that there was rain and storm in the evening preceding the day he saw the funeral procession—just like the *Kal-Baisakh* (or the familiar Nor'wester, typical of the Bengali month of Baisakh, April-May), (*ibid*, p 8, ll 17-22) Then followed another bit of "incredible" re-examination, as the learned judge puts it (*Vol 18, p 368, ll 22-25*)

"Q—You spoke of *Kal-Baisakh* in your cross-examination In which month or months does the *Kal-Baisakh* take place?

A—From the end of March to the first week of May

Q—When there is rain and storm of *Kal-Baisakh*, does it take place all over Darjeeling? (*Objected to*)

A—Yes, it takes place all over Darjeeling

Q—Because the death of the Kumar took place during the *Kal-Baisakh* time, you said that there was rain and storm from the evening till 9 o'clock at night on the night preceding the day of the procession, or after such a long time you clearly remember that rains and storm did actually take place on the night preceding the day of the procession? (*Objected to*)

A—I have no recollection

Q—Because it was the season of *Kal-Baisakh* you said that there might have been rains or storm on the night preceding the day of the procession? (*Objected to*)

A—Yes, it was because it was the season of *Kal-Baisakh*" (*Vol 3, p 15, ll 5-19*)

This was not re-examination at all, but was really in the nature of a cross-examination, as Mr Chaudhuri himself had to concede, and the defendants actually put to the witness his previous statement to contradict him (*ibid*, p 15, ll 22-25) In my opinion, the whole of this re-examination should be expunged as utterly inadmissible, and if that is done, his evidence regarding the rain and storm stands As regards his alleged conversation with Anukul Chatterjee about which he spoke in cross-examination, strictly this is not evidence, but as the learned judge points out, the defendants themselves helped to establish the fact of the conversation by eliciting its content (*Vol 18, p 368, ll 25-37*)

Mr Chaudhuri's suggestion was that since the witness gave his statement to the Deputy Magistrate, he must have been got at by the plaintiff otherwise, he said, such a direct question could not have been put to him in cross-examination regarding Anukul Chatterjee as was in fact done But learned counsel forgets that the plaintiff had cited Fakir Chandra Roy as a witness long before, and his name was also mentioned by Sitanta Kumar Bagchi, and the plaintiff might well be supposed to have known from him the facts which he was in a position to prove If one is to judge from surrounding circumstances, the credit for getting at the witness must go to the defendants, and they have none but themselves to thank for the disaster he brought on them which more than counteracted the little service they had out of him

EVIDENCE OF SUSILA SUNDARI DEVI

Reference may now be made to the evidence of Susila Sundari Devi, P W 1016, (*Vol. 11, pp 516-521*), the lady whose brothers Jatindra Chandra Chakravarti, P W 947 (*Vol. 10, pp 418-424*) and Basanta Chakravarti, since deceased, are said to have gone to the evening cremation, and one of whose sons Sailendra Kumar Kusari has also given evidence for the plaintiff on commission (*Vol. 11, pp 329-333*). Her husband, Raj Kumar Kusari deceased, is supposed to have given a statement to N K Roy on the 2nd June, 1921, which has been put in by the defendants (*Ex Z (340) (a), Vol. 11, p 233*), though it is not clear how this is evidence, merely because his son Sailendra Kumar Kusari proved his signature on it (*Vol. 11, p 331, l. 30 and p 332, ll 8-9*).

Susila Sundari's story is that her brothers returned from the cremation ground at about 1-30 or 2 A M in the night, their clothes all wet, and reported the missing of the dead body in the rain and storm for which it could not be cremated. In cross-examination she said, giving the time by guess, that the rain and storm which was very heavy began at about 10-30 or 10-45 P M, and lasted certainly for an hour and a half (*ibid, p 520, ll 1-8*). She heard the next day of a funeral procession of the Kumar, but heard also that it was a "faked" procession, as the body carried in it was a body taken from the Victoria Hospital (*ibid, p 520, ll 29-31*).

She gives some useful information about the nurse Jagat Mohini, who is said to have come to her house once at the birth of her fourth son Birendra, and told her at the time that she was a Kayastha, since turned Christian (*ibid, p 518, ll 1-4 and l 13*). She confirms the evidence of her brother Jatindra (*Vol. 10, p 421, ll 5-14*) that Jagat Mohini was not the wife of Rajani Kanta Chakravarty of Shologhar, who was their family priest (*Vol. 11, p 518, ll 15-16, and ll 28-29*).

Incidentally, she mentions that her husband died at Darjeeling at night at 1-30 A M, and his body was removed to the *sasan* before dawn, though it was raining at the time, and she says this was done for fear of a *bashi nana*,—the custom which only excited Mr Chandhuri's ridicule.

In my opinion, the evidence of this lady remains wholly unshaken in cross-examination, and it is indeed difficult to see why a respectable Hindu widow of her age and position should come to perjure herself in open court for no conceivable reason. Mr Chandhuri suggests that her evidence is wholly contradicted by her husband's statement (*Vol. 11, p 233*), and that is why it is said she stated in her examination-in-chief that she had not told her husband what she had heard from her brothers regarding their experiences in the *sasan* in connection with the Kumar's cremation (*Vol. 11, p 517, ll 26-27*). To say the least of it, it is doubtful if the statement is evidence at all, but apart from this, the comment itself seems to be disingenuous, for the witness never tries to conceal the fact that her husband heard the story which her brothers were relating. She distinctly says that she did not tell him as he could hear it (*ibid, p 519, ll 21-25*), and further that her brothers spoke to her husband that very night (*ibid, p. 519, ll 22-27*). Then, one fails to see wherein lies any possible contradiction between the lady's evidence and her husband's statement.

SAILENDRA KUMAR KUSARI

Her son Sailendra Kumar Kusari (*Vol 11, pp 329-333*), who also speaks to the incidents of that evening as far as he recollects, was a boy of only 12 or 13 years at the time, but he gives a special reason for remembering the fact A Brahmin Raja of their part of the country had come to Darjeeling for a change and died all on a sudden, and the death was a surprising one, because the body was not cremated, nor could it be found (*ibid, p 330, ll 8-12*) Also, one Kumar of Bhowal had come to Darjeeling a few years before and lived in a house next to theirs, and his father had an intimate acquaintance with the family (*ibid, ll 4-7*) This last fact about the previous visit of a Bhowal Kumar to Darjeeling is indeed confirmed by one of the defendants' documents (*Ex Z(252), Vol II, p 250*), a statement of Matlal Ganguli before a Deputy Magistrate (*ibid, ll 12-16*), and was also admitted before us by Mr Chaudhuri

STORY OF RAINFALL RECORDS

The question now to be considered is whether the whole mass of evidence on the plaintiff's side regarding rain and storm on the night of the 8th May is out-weighed by the rainfall records on which the defendants rely It appears that there were at least four rain gauges maintained at Darjeeling in those days, one at St Paul's School, another at St Joseph's College, a third at the Botanical Gardens and the fourth at the Municipal office, the readings at St Paul's being taken for the Government Meteorological Department and published in the official weather reports in the Calcutta Gazette St Paul's School is at the highest level, being located at Jalapahar which is higher than the Observatory Hill its height is given by P W 969, Sashu Mohon Das, as 7,800 feet (*Vol 11, p 102, ll 28-30*) St Joseph's College is at North Point on Cart Road as it turns east towards Lebong, and according to D W 12, Rev Father Peel, it is at an altitude of 6,300 to 6,400 feet, and about 500 feet lower than the Market Square, its distance by road being $1\frac{1}{4}$ to 2 miles from Lebong and $1\frac{1}{4}$ to $1\frac{1}{2}$ miles from the Bazar (*Vol 12, p 392, ll 33-36 and p 398, ll 16-17*) According to P W 969, Sashu Mohon Das (*supra*), it is 10 or 15 feet higher than the Darjeeling Railway Station, which is about 7,000 feet high, the same as the Market Square (*Vol 11, p 102, l 29, and p 103, ll 3-5*) The cremation ground is said to be at a height of 4,500 feet (*ibid, p 102, ll 30-31*) The Botanical Gardens are on Victoria Road which is the western boundary, the Market being to the north-east of it and at a higher level (*P W 118, Vol 14, p 420, ll 24-26*) The Municipal office at that time was also on Cart Road and at the same level as the Market

In addition to these records, Mr Chaudhuri relies on Dr B B Sarkar's diary, *Ex Z(215)* (*Vol I, pp 247-254*), in which a note appears to have been made about the general condition of the weather from day to day, though there is no evidence as to when or in respect of what period of the day the note was made all that Dr Sarkar's son who proves the diary says is that his father usually would take his evening meal at 9 P M and retire to bed at 11 P M (*Vol 15, p 417, ll 16-17*)

Rainfall readings used also to be taken at Planters' Club, but these have not been produced it will be remembered that Manmatha Nath Chaudhuri, P W 986, who was then Head Clerk of the Club, said that some years ago,

two Bengalee gentlemen had called at the Club and taken away the book for 1909 (*Vol 11, p 279, ll 28-38*)

Mr Chaudhuri's point is that none of the rainfall records which are in evidence show any rain on the night of the 8th May

Having regard to the testimony of the plaintiff's witnesses, the record at the Municipal office or at the Botanical Gardens might have been useful evidence on the defendants' side, the Municipal office, as already stated, being situated on the same level as the bazar, and the Botanical Gardens at a lower level, though not so low as the *sasan*. The Municipal register (*Ex 469, Photo Album, Vol I, p 27*), however, bears evident marks of tampering, and the learned judge was consequently unable to place any reliance on it, (*Vol 18, p 374, l 28—p 375, l 2*). As regards the Botanical Gardens register (*Ex Z(207), Vol I, p 396*), he held that it was very irregularly kept and that the page for the month of May, 1909, at all events, was fabricated (*Vol 18, p 375, ll 3-27*).

As for the other two records, the learned judge was apparently not satisfied that they tallied with each other, or that the absence of any record of rain at either of these places would necessarily exclude rain in other parts of Darjeeling (*Vol 18, p 374, ll. 1-8 and p 376, ll 9-11*).

SYSTEM OF RECORDING

In order to be able to follow the readings in the various registers, it is necessary to know something about the system which was in force at these observatories for making the record. There is the evidence of only two witnesses on the point, that of the Rev Father Peel, D W 12 (*Vol 12, pp 392-400*) about St Joseph's College, and of Bahadur Sing, D W 118 (*Vol 14, pp 420-425*) about the Botanical Gardens. As regards the other records, the documents are left to speak for themselves.

The St Paul's register, from which an extract only for the month of May, 1909 has been produced by the defendants (*Ex Z(328), Photo Album, Vol II, p 41*), shows that readings were taken three times a day, namely, at 8 A M, 10 A M and 4 P M, and the final entry would be made in the last column at 8 A M every morning showing the total rainfall of the previous 24 hours: this total would include the 8 A M reading of that morning and the 10 A M and 4 P M readings of the previous day. It seems to be quite clear that the date against which the entries are shown is the date on which the record is actually made, and this in fact necessitates the explanatory note that the entry of the total in the last column represents the total of 24 hours commencing from 8 A M of the previous day.

As regards the St Joseph's register, this is what the Rev Father Peel says:

"The readings were kept twice daily up to 1907—at 7-30 A M and 8-30 P M, and after that only at 7-30 A M

The rainfall read on the morning, say, of the 3rd, would be entered as *belonging to the 2nd*, but the other data, e g, barometer, thermometer would mean as at the time of the record" (*Vol 12, p 392, l 39—p 393, l 5*).

Mr Chandhuri would read the words "entered as belonging to the 2nd" to mean that the reading taken on the morning of the 3rd would be entered under date the 2nd, in other words, according to him, the entry of rainfall in this register appearing under any date, would represent the rainfall of 24 hours *commencing* from the morning of that day. This, however, is contradicted by the witness' own statement which follows

"Each entry of rainfall means entry for 12 *past* hours up to 1907, and for 24 hours after ("up to" is a misprint) 1908, that is, 24 hours *next before the time of entry*" (*ibid*, p 393, ll 8-10)

In my opinion, the learned judge put the correct interpretation on this evidence, when referring to the figure for the 12th May he said

"Father Peel explains that this means the figure entered at 7-30 A M on the 12th, which means rain either on the 11th (*i e*, after 7-30 on the 11th), or on the 12th before 7-30" (*Vol 18, p 374, ll 5-8*)

This would in fact be the common-sense view to take, for, there would be no point in ante-dating the record by a day, particularly as Father Peel says that the barometer and thermometer readings would be entered "as at the time of the record"

The system in vogue at the Botanical Gardens was also the same, as explained by Bahadur Singh, D W 118, who says

"The figure for rainfall taken at 8 A M to-day means figure for rainfall between 8 A M of the previous day and 8 A M of to-day. Since I entered service the figures were recorded thus—every day at 8 A M" (*Vol 14, p 421, ll 19-21*)

So far as the Municipal record is concerned, there is not only no evidence as to what system was followed, but nothing to show at what time of the day the readings were taken, and yet it will be recognised that this is an important fact without knowing which no proper comparison is possible with the other records

PLAINTIFF'S CHARGE OF TAMPERING WITH MUNICIPAL RECORD

The trial judge, as I have said, was unable to come to any conclusion regarding the Municipal register, but Mr Chatterjee on behalf of the plaintiff has contended before us that the original entry in this record, before it was tampered with, showed rainfall on the 8th May, 1909. The tampering could not be denied, as the document bears *ex facie* unmistakable signs of it, but either side accused the other of having been concerned in this villainous transaction. The facsimile of the document to be found in the *Photo Album, Vol I, p 27*, shows an alteration in the entry of the intervening date between "3-5-09" and "14-5-09"

The plaintiff's case is that this date as originally entered was "8-5-09", or it may be, "9-5-09", and that the figure "8" or "9" was subsequently altered to "13", whereas the defendants suggest that the original entry was "13" which it was sought to alter to "8", but that the attempt having failed, the figure "13" was restored and written again at the top. In order to appreciate the arguments of either party, it is necessary to note a few

of the consecutive dates appearing above and below the disputed entry in this register

1-5-09, 2-5-09, 3-5-09, 13-5-09 (disputed), 14-5-09, 15-5-09

COUNTER-CHARGE BY DEFENDANTS

Mr Chaudhuri tries to meet the plaintiff's case by showing that both St Paul's and St Joseph's record rainfall at Darjeeling on the 12th May, — 35 inches at the former under date the 13th May (*Photo Album, Vol II, p 41*) and, according to his reading of the system of recording, 300 millimetres at the latter under date the 12th May (*Vol I, p 393*), and that for the same day, the Botanical Gardens register also shows rainfall of 57 inches (*Vol I, p 396*), and Dr Sarkar's diary "hailstorm at night" (*Vol I, p 249*), and by arguing from this that there must be some record of the rain in the Municipal office rain-gauge as well, and he suggests that it would be recorded under date the 13th May, every probability thus pointing to the original entry being "13", this of course assumes that the St Paul's system of record was followed here, otherwise, it is said, there would be no record at all of the rain

Secondly, Mr Chaudhuri points out that it would not avail the plaintiff at all if the original entry was "8", for, if there was rain on the 8th May, it would be shown under date the 9th, assuming again the same system of recording as at St Paul's

Mr Chaudhuri's argument would be not without force, if it could be shown—

- (i) that the register produced for the Botanical Gardens was an authentic record, and
- (ii) that it could not rain at St Paul's or at St Joseph's without raining at the same time at the Botanical Gardens or the Municipal office

If (i) is established, this by itself would be sufficient for the purposes of the defendants' case, as the Botanical Gardens record shows no rain on the 8th May, and a reference to the Municipal register would be wholly superfluous, the Botanical Gardens being at a much lower level than the Municipal office and nearer the *susan*. So far as (ii) is concerned, the only support for such a proposition comes from Father Peel, but his evidence at its best is that of a mere meteorological expert, and it is no disparagement to him to say that it gives forth no certain sound

FATHER PEEL'S EVIDENCE

I am not at all sure that it will serve any useful purpose to discuss this evidence at length. In the first place, there is no evidence that all the data on which he purported to base his opinions were necessarily accurate, secondly, as he himself admitted, there were certain hypothetical factors, or "probabilities", as he termed them, which he had to take into account (*Vol 12, p 399, ll 7-19*). Speaking from such knowledge as he had of the inexact science of meteorology, he did not lack the conviction to assert that a phenomenon like Chowringhee, a well-known thoroughfare in Calcutta, being wet up to a point and then dry up to the "point of demarcation" is a thing "meteorologically impossible" (*ibid, p 395, ll 12-14*), though this is a fact which must be within the common experience of every inhabitant of this city. He again went so far as to say that the weather conditions

of Darjeeling in the month of May must be the same every year (*ibid*, p 397, ll 12-13) though it may be pointed out that the defendants' own record, the Botanical Gardens register, shows varying totals of rainfall in this month in different years—9.63 inches in 1909 (*Ex Z* (207), Vol I, p 396), 10.15 in 1911 (*Ex Z* (208), *ibid*, p 397), 3.88 in 1912 (*Ex Z* (209), *ibid*, p 398) and 6.36 in 1922 (*Ex Z* (210), *ibid*, p 399)

He was asked in examination-in-chief if there was no rain-fall recorded at St Joseph's and St Paul's between the 5th and the 11th May, could there have been rain within a 10-mile radius? He answered,—certainly no rain at Darjeeling Spur, by which he meant the spur coming down from Ghoom, Katapahar, Jalapahar, Government House, Birch Hill and St Joseph's College (*Vol 12*, p 393, ll 23-29) The next question was, if there was no rain at St Joseph's and at St Paul's between those dates, could there have been rain near Morganstein's house (i.e., the *sasan* area) and at the Market Square? And the answer was,—not, without being recorded either at St Paul's or St Joseph's (*ibid*, ll 32-35) The conclusion was that any rain at Darjeeling was bound to be recorded at one or other of these observatories (*ibid*, p 394, ll 4-5) As to whether or why such uniformity of rainfall was a characteristic of Darjeeling weather conditions only between the specific dates suggested, he did not choose to explain, but he certainly does not appear to have tested his theoretical conclusions by a comparison of actual readings of the different rain-gauges at Darjeeling over a number of years, or any extended period in the same year, or over any period at all In my opinion, it would be wholly unsafe to rest any certain conclusion on the uncertain basis of what might be no more than mere accidental coincidences for only a number of days

Father Peel himself was obliged to concede that if monsoonish conditions prevailed, there might be possibility of rain at Lebong and Chowrasta without rain at the Bazar or Ghoom (*ibid*, p 397, ll 23-25), and he further admitted that the date of the oncoming of monsoonish conditions varied from year to year (*ibid*, ll 26-28) That such conditions had actually set in at Darjeeling about the 8th May in the year 1909 would appear from the evidence of defendants' own witness Fakir Chandra Roy about the *Kal-Baisakhi*, which has been already referred to

UNCERTAIN CONCLUSIONS

As against this expert evidence, there is lay evidence on the side of the defendants themselves, which tells a different story Calveit, for instance, said "I know in Darjeeling there may be rain in some places and no rain in others" (*Vol 2*, p 222, ll 25-26) Mohendra Nath Banerjee, again, said, "At Darjeeling I have seen that it is raining at a higher level but no rains below, also it is raining below but no rains on the higher level" (*Vol 1*, p 332, ll 24-25) Shyamadas Banerjee also spoke to the same effect "I saw such things at Darjeeling that for a few minutes it was raining at a lower level, and on the upper level it was not raining" (*Vol 1*, p 269, ll 36-38)

An examination of the rainfall registers themselves as they stand reveals so many and such striking discrepancies that it seems to be impossible to predicate with certainty that if it rained at St Paul's School or at St Joseph's College, the rain was bound to be recorded in the rain gauge at the Botanical Gardens or the Municipal office Even during the month of May,

1909, for which the records have been produced, there are at least four dates for which, even according to Mr Chaudhuri's way of reading the charts, the registers at St Paul's and St Joseph's do not tally with each other. Thus, under dates the 23rd, 30th and 31st May, St Paul's shows no rainfall, but rain is recorded in St Joseph's under the 22nd, 29th and 30th May to the extent of 055, 027 and 00 mm respectively, assuming that the corresponding entries would appear in this register under these dates. On the other hand, St Paul's records 43 inch of rainfall under the 24th May, but St. Joseph's shows nil under the 23rd, May, if that be the corresponding date

NO UNIFORMITY OF RAINFALL

Supposing, on the other hand, the system of recording to have been uniform at both these observatories, there are discrepancies to be observed under at least three dates

<i>Date</i>	<i>St Paul's (in inches)</i>	<i>St Joseph's (in millimetres)</i>
4th May	04	Nil
12th May	Nil	300
30th May	Nil	003

It would perhaps be helpful to subjoin a comparative chart of the readings in the four registers for a number of days in the month of May, a double set of figures being given for St Joseph's, the first set under (i) in the table below being on the basis of a uniform system of recording, and the second under (ii) on the assumption that the system was different as suggested by Mr Chaudhuri

<i>Date</i>	<i>St Paul's (in inches)</i>	<i>Municipal office (in inches)</i>	<i>Botanical Gardens (in inches)</i>	<i>St Joseph's (in millimetres)</i>	
				(i)	(ii)
4th May	04	Nil	49	Nil	047
12th May	Nil	Nil	Nil	300	Nil
23rd May	Nil	18	13	Nil	055
24th May	43	45	63	149	Nil
26th May	15	Nil	02	818	005
30th May	Nil	02	Nil	003	027
31st May	Nil	Nil	Nil	Nil	003

A comparative examination of these records, without any assistance towards an explanation from the evidence, also discloses a remarkable degree of quantitative difference between them, the St Joseph's figures expressed in millimetres, if they have been correctly recorded, being strikingly on the

lower side, as compared with the others,—one millimetre, it may be stated, being equivalent to 0.03937 inch, say, roughly 1/25th of an inch. Thus, for instance, the heaviest rainfall in the month of May, according to the registers, was between the morning of the 13th and the morning of the 14th, being 3.10 in the Municipal record, 3.50 at St Paul's and 2.61 at the Botanical Gardens, all expressed in inches and shown under date the 14th May, but St Joseph's records only 137 mm against this date, or -551 mm, if the corresponding date be taken to be the 13th May.

DR B B SARKAR'S DIARY

Taking Dr Sarkar's diary next, a few dates may be picked out at random to show how it differs from the other records.

1st May "fair", 2nd May "misty", 15th May "fair", 16th May "bright, cloudy", 17th May "bright, cloudy", 21st May "fair, bright", but on every one of these dates there is rainfall recorded in the other rain gauges. Then, again

3rd May "rainy morning", but no rain in the Municipal register or at St Joseph's under date the 4th May,

22nd May "slight rain", but nil at St Paul's and nil at St Joseph's on the 23rd May,

25th May "rain, not much", but no rain at the Municipal office on 26th,

30th May "drizzling mudday", but no rain at any of the other places on the 31st.

In this state of the rainfall records, it is difficult to see how Mr Chaudhuri can contend with any assurance that merely because the observatories at St Paul's and at St Joseph's recorded rainfall on the 12th May (under date the 13th), the disputed entry in the Municipal register must necessarily relate to the rainfall of this day. The probabilities might equally point to there being a record in the Municipal register of rainfall on the 8th May without there being a corresponding record either at St Paul's or at St Joseph's, just as there was rain on the 22nd recorded at the Municipal office the following day, but not at the other two observatories.

DEFENCE THEORY NOT ESTABLISHED

In my opinion, Mr Chaudhuri's theory of uniformity of rainfall all over Darjeeling is discounted by the rainfall records themselves, and I cannot say that the learned judge went "clearly wrong" in holding that rain on the 8th May in the Cart Road and below, particularly in the *sasan* area, was not *ipso facto* excluded by reason of anything appearing or not appearing in these records. As the learned judge points out, "the evidence on the side of the plaintiff is that the rain that occurred on that day fell on the Cart Road or even a little higher, but no witness mentions as high as the Mackenzie Road or the Commercial Row or the Chowrasta" (*Vol 18, p 374, ll 20-23*).

Mr Chaudhuri was not quite accurate in suggesting that the plaintiff carried the rainfall as high as the Planters' Club or above Commercial Row: neither the evidence of Dhanjit, P W 986 (*Vol 11, p 62, ll 28 et seq*), nor that of Bhakatbar Roy, P W 988 (*ibid, p 293, ll 36 et seq and p 294, ll 4, 5*).

and 11), on which he relied, lends him any support. In any case, as I have indicated more than once, after such a long lapse of time the story of rainfall given by the plaintiff's witnesses ought not to be taken according to the strict letter of their evidence.

SCOTLAND YARD EXAMINATION OF MUNICIPAL RAIN-RECORD

Apart from the considerations set out above, one may perhaps look at the document itself to see that its physical appearance does not seem to support Mr Chaudhuri's conclusion that the original figure in the disputed entry in the Municipal register was "13".

It may be stated that at an early stage of the hearing of the appeal, both sides assented to the document being sent to Scotland Yard, London, for examination by X-Ray and Ultra-Violet Ray processes, in order to discover, if possible, what was the original entry, in what manner it had been altered or tampered with, and the precise sequence in which marks were put upon the paper and obliterated (*Vide Order of the 22nd December, 1938*). The document was accordingly forwarded to the proper quarters, and the Commissioner of Police of the Metropolis of London was good enough to forward to this Court by his letter No 74/For/781 (C 2 B) dated the 27th January, 1939, copies of police reports obtained by him, together with enlarged photographs of the suspected entry, taken under infra-red rays.

Neither party, however, expressed any anxiety to see the report or the photographs after they were received, though they were quite willing that the Court might look at them.

PHYSICAL CHARACTERISTICS OF DISPUTED ENTRY

Quite independently of the report and the infra-red photographs, however, certain physical characteristics are discernible on the face of the document itself, to which our attention was called by counsel on both sides before the papers were despatched to London.

Mr Chaudhuri suggested that the disputed figure must have been "13", otherwise it would be out of alignment with the figures in the succeeding entries. If it had been a single figure like "8" or "9", it should have been nearer to the left vertical line (in red ink).

It will be seen, however,—

- (i) that the entries from after "3-5-09" up to and inclusive of "18-5-09" are in a different hand from the other entries on the page, and the new writer evidently leans more to the right, and
- (ii) that the "1" in the altered figure is much nearer the second digit than in the subsequent entries.

What is more important is that there are no signs of an attempted previous obliteration of the figure "1", the only scoring visible being that of the second figure, whatever it was, and this will be more clearly seen if the paper is held against the light and looked at from the reverse. If it had been a two-digit figure at first, and somebody attempted to alter it in the interest of the plaintiff, the first numeral he was likely to have attacked would be "1", and he would have certainly roughened the surface in the

attempt, and even if it be supposed that he tried to tackle the second figure first, he could not have left the area of the first figure altogether unaffected. The document, however, does not show any traces of an original "1" over which the figure "1" now appearing was written after an unsuccessful attempt at erasure, but shows on the other hand that this figure stands quite intact over a surface already thinned away by mechanical rubbing, making it almost certain that it could not have been there from the beginning. It will be seen that in the process of tampering a small perforation was caused in the paper right through the centre of the second figure.

The outward indications of the document are in fact wholly in favour of Mr Chatterjee's suggestion that the original entry was a figure of one digit, and not of two, the "1" being a subsequent interpolation. As to whether the figure was "8" or "9" or anything else, it is impossible to make out definitely with the naked eye, but whatever it might have been, to my mind the fact that it was a single digit should carry the plaintiff a very long way, if not the whole length of it. It would definitely show that the tampering could not have been done in the interest of the plaintiff. It would be nonsensical to suppose that an agent of the plaintiff, having failed in his attempt to alter "13" to "8" or "9", would take care to restore the original, going the length of writing a clean figure "13" at the top, instead of disfiguring the whole of the entry.

TEXT OF SCOTLAND YARD REPORT

As I have stated, counsel on both sides made their submissions regarding the Municipal Rainfall register without any reference to the Scotland Yard report, the contents of which they did not in fact see, but the report so far as it goes seems to be distinctly in favour of Mr Chatterjee rather than of Mr Chaudhuri, and I might set it out here for what it is worth —

"The document has been examined by various scientific processes at the Metropolitan Police Laboratory, Hendon, who report as follows

"The entry "13-5-09" has been heavily erased mechanically and any underlying figures have been almost completely removed. An examination of the inks present suggests that all the alterations were made some time ago and the diagonal stroke through the erased "13" was written before the document was erased to its present condition. An infra-red photograph shows signs of ink which suggests that there has been a figure "6" underneath the erased figure "3". The photographs enclosed indicate this point.

It is suggested that the procedure was as follows —

A figure, probably "6" was written on the page. This was partially erased and overwritten with a "3". A "1" was placed alongside it. It was then crossed through, a figure "13" put above and then at some later time it was further erased.

"An enlarged photograph taken under infra-red rays gives the best result for examination purposes, and it may be that an attempt was made to erase the "13" before the diagonal stroke was written, after which further erasure occurred.

"Unfortunately in the process of erasure a hole was worn in the paper and it is therefore impossible to say with certainty what the original entry was."

Two facts clearly emerge from this report

- (1) that there was some other figure underneath the erased figure "3", and
- (2) that after this figure was overwritten with the "3", the figure "1" was placed alongside to its left

In other words, neither "1" nor "3" was originally there, and if the report can be relied on, it knocks out Mr Chaudhuri's theory completely. It is unfortunate that the original figure could not be traced with certainty. It was *probably* "6", which does not exclude the possibility of its having been "8" or "9". In the forwarding letter it was emphasised that the examination only suggested the order in which the alterations had been made.

STORY OF PRODUCTION OF RECORD IN COURT

To complete the story about the Municipal rainfall record, it is necessary now to refer to a few facts and dates in connection with the production of this document in court, which are not without significance as throwing light on the conduct of the parties.

Mr Chaudhuri's account of the matter as he gave it in his opening was this. The defendants applied for a certified copy of the rainfall record from the Darjeeling Municipality in November, 1934, and were supplied with one on the 30th of that month, which he said showed no alterations (*Ex Z (373), Vol I p 394*). It appeared that thereafter some surreptitious alterations were made in the record in April, 1935, and the Deputy Commissioner of Darjeeling made some enquiry about it at the time, about which, however, no evidence was allowed to be given. The plaintiff then applied for a certified copy in June, 1935, and he got one with the alterations shown on it, which is printed as *Ex 469 in Photo Album, Vol I, p 26*. Later on, while arguments were proceeding in the trial court, the original record was called for at the instance of the plaintiff and produced in court, and Mr Chaudhuri assented to its being marked as an exhibit as a public record without formal proof.

The account was not only meagre, but misleading. It did not bring out the fact that though the defendants obtained their certified copy on the 30th November, 1934, they did not put it in until the 28th of March, 1936, that is to say, not until the plaintiff had produced his copy on the 11th of March, 1936, after having obtained it only on the 18th February preceding. The only explanation which Mr Chaudhuri attempted to give at a later stage was that it could not be put in because it was not evidence, but that when the plaintiff produced a copy, the defendants produced theirs. It was pointed out that the defendants' evidence commenced only in February, 1935, and shortly thereafter, about the month of April, 1935, when they were preparing to call for the record to prove it, they came to learn for the first time about the tampering from the Municipal authorities. An enquiry was thereupon held, but as already stated, this was not allowed to be proved. Rightly or wrongly, because of the tampering, they took the view that the original record would be useless as evidence.

DEFENDANTS' HALTING EXPLANATION

The explanation seems to be halting in the extreme. The defendants were already armed with a clean certified copy, and if they had no reason to suspect that the original document was not equally clean and free from alterations, all that they need have done was to take out a summons on the Municipality for the production of the record instead of going to the Municipal office to make enquiries. Even after they heard about the tampering, the tampered record might have been produced along with their certified copy, and evidence given regarding the alleged enquiry at a stage when it could not have been possibly shut out by the court as being too late. The mutilated register might have been useless as evidence of a clean rainfall entry, but not certainly of a clean conscience.

Apparently Mr Chaudhuri did not believe that the certified copy obtained by his clients was altogether without value, for he laid great stress on the fact that it showed no alterations, which according to him was almost conclusive proof that at least on the date on which the copy was issued the entry in the register was "13-5-08". The argument, however, seems to be wholly without substance, as it requires no acuteness to see that the copyist might quite easily and naturally have taken the altered figure as the correct one and put it down accordingly in the copy. The reason why the plaintiff's copy was in a different form is probably because he had asked for it in that form.

PLAINTIFF'S CONDUCT A STRIKING CONTRAST

An important fact which Mr Chaudhuri was unwilling to face was that the plaintiff called for and produced the original record, though it bore an alteration which on the face of it went against him. Would that be the conduct of a tamperer?

According to Mr Chaudhuri, the tampering must have been done in or about the month of April, 1935, and done at the instance of the plaintiff. Still it seems to be surprising that the plaintiff should since then have been making strenuous efforts to obtain a certified copy of the document from the Municipality. Some evidence of these efforts is furnished by *Exs 423, 424, 425 and 422 (Vol I, pp 400-403)*. It appears his lawyer Mr Arabinda Guha first applied to the Chairman of the Municipality by a registered letter delivered to him on the 13th June, 1935, and 4 days later remitted to him Rs 3 by money order as cost. Apparently this produced no response, and he had to follow it up with a formal petition with a vakalatnama and court fee stamps on the 20th September following, only to be informed by the Chairman in reply that a vakalatnama "in the proper form" had to be filed and an application made through the court for production of the original on payment of the usual fees. It is idle to speculate what led the Municipality to put these obstacles in the way, whether it was due to a mere anxiety on their part to hide a scandal in their own office, or to the working of an unseen hand trying, if possible, to make inaccessible to the court the traces of its criminal misdeed. The fact remains that not until the 19th February, 1936 the plaintiff got his certified copy, and within three weeks he filed it in court by a petition dated the 11th March, 1936, whereby he also called for the production of the original record from the Municipality (*Vol 17, p 414*). The prayer was allowed and the document was received in court on the 21st March, 1936, and admitted in evidence along with the certified copy.

on the 23rd following (*see orders Nos 1489, 1499 and 1501, Vol 1, pp 112-113*) The document was then inspected by the lawyers on both sides, and the defendants put on record their observations by a petition filed on the 23rd March, 1936 (*Vol 17, pp 415-416*), to which the plaintiff answered by a petition on the 26th March (*ibid, pp 417-418*)

I refuse to believe that the original entry was "13-5-09", that the plaintiff tried to tamper with it, that failing in the attempt, he restored the old figure, and that he then applied for and obtained a certified copy, and finally produced the original record in court—for no conceivable purpose whatever. If he was the criminal, why should he be so anxious to publish the evidence of his own crime? It is not even possible to suggest that the object was to divert suspicion from himself, for no suspicion had been raised against him at all.

I cannot help observing that his action in calling for and producing this tampered record, even at a late stage of the case, seems to me to furnish only one more illustration, not only of his willingness, but of his anxiety to face all documents that came his way,—in marked contrast to the secretive and selective tendencies so strikingly characteristic of his opponents.

TAMPERING THE WORK OF DEFENDANTS

On a careful consideration of all the facts and circumstances, it is my definite conclusion that the tampering of the Municipal rainfall record was done in the interest of the defendants, and if that be so, the reasonable inference is that the original entry was in favour of the plaintiff and showed rainfall on the 8th May. At any rate, it clearly does not exclude rainfall on this date.

The learned judge thought it "strange" that the plaintiff did not apply for a certified copy before June, 1935 (*Vol 18, p 374, ll 39-40*), but it is just possible that he did so then only on hearing reports about the tampering; otherwise he would probably not have applied at all. There is no evidence in fact that he had made enquiries for any of the Darjeeling rainfall records at any stage.

BOTANICAL GARDENS REGISTER

It remains now to consider the Botanical Gardens register, which as already stated shows no rainfall on the 8th May, though it records 57 inch on the 12th. The learned judge was unable to place any reliance on the document, specially on the entries for the month of May, 1909, and having regard to the evidence of Bahadur Sing, D W 118 (*Vol 14, pp 420-425*), who proved this record, I am not prepared to say that he was "clearly wrong." The witness is said to have been a clerk in the Gardens since December, 1908, although his Service Book (*Ex Z(248), Vol 1, p 285*), produced by the defendants at a much later stage through D W 366 (*Vol 16, pp 347-350*), showed the 1st March, 1909 as the date of his substantive appointment. He maintained that the register was "kept in course of business and correctly" (*Vol 14, p 421, l 30*), but the facts elicited from him in evidence were enough to negative such a claim.

AN UNRELIABLE RECORD

He stated that from December, 1908 onwards the rainfall entries were made by him, but that in the event of his illness the Curator would write up the book, or if the witness went on leave his substitute would do so (*ibid*, p 421, ll 9-11) in cross-examination, however, he changed his statement and said "readings were sometimes taken in a slip by the sahib in my absence, and I would post the figures from the slip to the book" (*ibid*, p 423, ll 36-37) In trying to explain away a confused answer he had given to the court that his first appointment was at Sikkim which he left after 3 years in 1922 or 1923 (*ibid*, p 422, ll 25-31), he said in re-examination that he wrote the entries for 1922 in the book (*ibid*, p 425, ll 9-10), apparently with the object of making out that he was on duty in his present post at Darjeeling throughout that year His Service Book, however, when produced showed that he was on leave from the 15th May to the 31st August, 1922 (*Vol I*, p 266), so that the entries for this period, at any rate, would not be in his hand at all, but on his own showing, in that of his substitute This obviously makes it difficult to attach any value to his evidence of handwriting

It is significant that none of the pages in the register up to 1930 are signed by the Curator, though space is reserved at the foot of each page for the signature of this officer, indicated by a rubber stamp of his designation (*Vol 14*, p 423, ll 13-17), and the witness himself produced a page, purporting to be for the year 1915 with the signature of the then Curator Mr Cave on it (*ibid*, ll 18-19) According to the witness, the Curator would look up the book every 15 or 20 days and point out the mistakes, if any, but when he was asked if, in case he omitted to record the figure any day, he could supply it from memory so many days after, he first said he could, and then naively indicated that nobody would detect such omission, winding up with the statement that he never made any omission in recording the readings (*ibid*, p 423, ll 21-28) If on this evidence anybody was to say that there might have been an omission to record the rainfall of the 8th May, it would certainly not after all be a very improbable suggestion

The witness maintained that he never recorded in any month the readings of the previous month, but could not deny that the figures for April had been wrongly entered in the column for March, 1909 The mistake was subsequently put right by the sahib, but the correction was not initialled by him (*ibid*, p 423, ll 28-33) In the total for March, 1909, again, the figure "9" was first entered and then scored through, but the witness could give no explanation of this (*ibid*, p 424, ll 4-6) Temperature figures, he said, were entered up to the 16th June, 1909 after which they were discontinued, but there were irregular entries even up to September, 1910 (*ibid*, p 422, ll 1-6) Then, again, it is to be seen, as the learned judge points out, that from 1903 to 1908 the rainfall figures were recorded on the first page and the temperature figures on the next, but for some unaccountable reason the order appears to have been reversed in the year 1909

Beyond pointing out that the condition of the book itself was not above suspicion, pages being pasted to it where the stitch had gone off (*ibid*, p 424, ll 37-39), it is hardly necessary to refer to the evidence any further the indications are abundant that the register was kept in a most perfunctory manner, and, to say the least, it is more than doubtful if it was kept by the witness at all, and I repeat that I see no reason whatever for rejecting the learned judge's conclusion (*Vol 18*, p 375, ll 22-27)

In the course of his arguments Mr Chatterjee sought to raise a point that the witness produced in court was not the real Bahadur Singh, as neither his father's name, nor his age, nor the date of his appointment as given by him in his evidence tallied with the particulars appearing in the service sheet. The matter, however, was not pursued, and as it is not noticed in the judgment of the trial court, nothing further need be said about it.

FINAL CONCLUSION

It thus follows from a consideration of all the rainfall registers that there is nothing in this body of documentary evidence which tends to destroy the plaintiff's evidence of rain and storm on the night of the 8th May.

All the grounds so far urged by Mr Chaudhuri to discredit the plaintiff's story of the evening procession and its sequel, therefore, fail, and the story must consequently stand, unless it is shaken in any way by the defendants' evidence of the morning cremation.

This takes us to the next section of the Darjeeling chapter, but before passing on to it, it is perhaps necessary to correct Mr Chaudhuri's misreading of the trial court's finding regarding the attempted evening cremation, as if it was supposed to follow from the mere fact of death at dusk. That finding is expressed in these terms: "I have thus found that the facts connected with the *sasan*, or the shelters, or the rain, do not discredit the account given of what happened at the *sasan* on the night of the 8th May if the body of the Kumar was taken there that night, as it *must* have been, if he had died at about dusk" (Vol 18, p 376, ll 15-18). The learned judge might perhaps have expressed himself a little more clearly, avoiding the words "if" and "must", so as to leave no room for ambiguity, but there can be no doubt that what he meant to say was that as the Kumar had died at dusk, it is only reasonable to suppose that his body must have been taken to the *sasan* that night, and that being so, there would be nothing to discredit the plaintiff's story of the happenings at the *sasan*, unless it was negatived by the facts and circumstances urged by the defendants regarding the *sasan* and the shelters and the rain. In other words, he held that while on the one hand the story was consistent with death at dusk which had been already found, it was, on the other, not contradicted by any of the facts connected with the *sasan* or the shelters or the rain. In the very next sentence the learned judge referred to the positive evidence on the plaintiff's side, which he believed and on which he really rested his conclusion.

It will be observed that throughout the discussion of this evidence not a word is said about identity.

It remains to add that the evening procession was a comparatively quiet affair with none of the pomp which was a feature of the morning show, no cuns being distributed on the way (*vide Kiron Chaudia Mustafi, Vol 10, p 385, l 37 and Bisweswar Mukherjee, ibid, p 397, ll 4-5*).

NO CHANGES IN PLAINTIFF'S CASE

In the course of his arguments Mr Chaudhuri often referred to what he described as successive changes in the plaintiff's case regarding the happenings at the *sasan*. The first story, he said, was that when the cremation party missed the body and could not find it out, they left after setting fire to an empty pyre, and in support of this he referred to what appeared in the Bengali pamphlets published some time after the plaintiff's Declaration of

Identity, "*Fakir Beshe Praner Raja*" (*Ex T*, Vol II, p 346) and "*Bhowaler Kaiha O Nabim Sannyasi*" (*Ex T* (1), *ibid*, p 344). The next variant was said to be the version which Bibhuti or Chandra Sekhar Banerjee, P W 959 (Vol II, p 28, ll 5-9) gave, writing to Calvert on the 13th September, 1923 about a rumour to the effect "that the dead body disappeared from the pyre during a storm and rain when the cremation party had taken shelter at a distance before setting fire to the body" (*Ex Z* (371), Vol III, p 348, ll 22-25), which meant that the body been put on the pyre before the men ran away for shelter.

With all respect to Mr Chaudhuri, one fails to see how either the story in the Bengali pamphlets or the rumour spoken to by Bibhuti may in any sense be regarded as the plaintiff's case. By this token, the plaintiff might be made equally responsible for the rumour referred to in Ram Satyabhama's letter to the Maharajadhiraj of Burdwan (*Ex Z* (33), Vol II, p 175). The fact remains that none of the plaintiff's witnesses have spoken to the body having been placed on the pyre before it was missed, or to an empty pyre being lit after it had been missed.

And yet, if one may speculate, the rumours might not have been without some foundation in fact not at all excluded by anything appearing in the evidence on record. It may well be that after all the outsiders in the cremation party had left, either of their own accord or sent away because it was getting too late, it occurred to the Kumar's people who remained behind, when in spite of continued search they were still unable to trace the body, to stage a cremation with an empty pyre as a last resort and as the only means they could think of at that stage of covering up a scandal, for a scandal it was, though not due to any deliberate remissness on their part. A second body might not have been available yet to suggest the brilliant idea of a second cremation, or such an idea might not yet have taken root in any fertile brain to lead to the search for a second body.

6 THE MORNING CREMATION OF THE 9TH MAY

On the question of the morning cremation the trial judge records the definite conclusion that it was a "faked" show with a "substituted body", and be it noted, he arrives at this finding on an independent examination of the evidence touching this cremation, uninfluenced by any of the facts connected with the evening attempt (Vol 18, p 377, ll 26-28).

One of Mr Chaudhuri's complaints which he has strongly emphasised before us is that the learned judge has not considered the whole of the defendants' evidence, but merely given a list of their witnesses which, again, is incomplete by one, and of these, it is said, he discusses the testimony of only 4, namely, R. N. Banerjee, Haran Chakladar, Gita Devi and Jagat Mohini.

I may be forgiven for saying that learned counsel was manufacturing a grievance for the sake of a grievance. In the first place, having regard to the fact that the morning cremation is admitted by the plaintiff, the question to be considered in this connection lies within a narrow compass, the only point being whether or not the body which was taken out was that of the second Kumar, and many of the witnesses can be, therefore, eliminated without prejudice to the defendants' case. Secondly, it is not correct to state that the learned judge considers the evidence of only 4 of their witnesses. He refers to several others in the course of his examination of what he describes as "a few broad facts", which in his opinion belie the defendants' story that the body was exposed and the usual rites were performed at the

sasan (Vol 18, pp 385-388) Thirdly, as regards the omission Mr Chaudhuri complains of, one is not sure that his clients have suffered at all on this account, seeing that the witness left out, Gopal Singh, a *baburchi*, D W 418 (Vol 17, pp 331-332) says that he saw the dead body in a "sitting posture" on the *charpoy* at "Step Aside",—no doubt with face uncovered, but the rest of the body "covered with a sewn garment from neck to foot"! Lastly, it is not to be supposed, merely because the judgment does not contain a detailed reference to the evidence of each individual witness, that the whole of the evidence has not been considered to apply such a test in a case like this might be a counsel of perfection, but would certainly be doing less than justice to the trial court whose judgment is in fact as full and fair as its most exacting critic could reasonably demand (see Vol 18, p 384, l 43—p 385, p 8)

DEFENCE EVIDENCE ANALYSED

Now, what is the evidence on which the defendants rely in support of their case that the body in the morning cremation was that of the second Kumar?

There is, first of all, the group of witnesses consisting mostly of the inmates of "Step Aside" who speak to the body having reposed in the clasp of the second Ranu all the time ever since midnight till it was torn away from her the next morning. There is, again, the evidence of persons who say they knew the Kumar in life and recognised his face after death as it lay exposed at the house,—a category which includes those who had only had casual opportunities of seeing the Kumar for the first time at Darjeeling on this occasion, and those who had seen and known him from before. There is, further, another body of witnesses who had neither known nor seen the Kumar in life at all, whether at Darjeeling or elsewhere, but deposed to having only seen a dead body that morning at "Step Aside" or at the cremation ground, with the face uncovered, it being common case that the face was not exposed as the body was being borne along in the procession. Finally, there is the evidence of all the witnesses who went to the *sasan* and say that the funeral was a normal one with full rites and ceremonies, at any rate that there was nothing unusual about it which they remembered.

Emerging from this body of evidence, are certain broad facts which may not unfairly be regarded as a touch-stone against which to test such evidence. These are —

- (1) The Ranu clinging to the dead body right from midnight to next morning, directly negating the possibility of a substituted body. This involves—
- (2) Body remaining upstairs all the time till it was brought down and laid on the *charpoy*,
- (3) Face remained uncovered up to this stage,—permitting open recognition by all, and showing no attempt at concealment of features,
- (4) Messages sent to the Sanitarium and the Cutchery Building, shortly after midnight, and arrival of Rajendra Nath Sett from the Sanitarium with Tinkari Mukherjee and Bijoy Krishna Mukherjee, and of Shyamadas Banerjee from the Cutchery Building with Anukul Chatterjee, during the night,
- (5) Fresh calls sent out in the morning through Shyamadas Banerjee, Anukul Chatterjee, Jagat Mohun and another nurse Mangli, which

brought to "Step-Aside", among others, Kasiswari Devi (wife of the Government Pleader, Mahendra Nath Banerjee), her eldest son Balen and her youngest son Rabin (R N Banerjee) *alias* Behul,

- (6) Body exposed at the *sasan*, there again permitting full view, and discounting any suggestion of suspicious conduct,
- (7) Performance of full shastric rites at the cremation—including the recital of *mantras*, the putting on of a sacred thread or *paita* on the body, anointing the body with *ghee* and bathing it with *Ganges* water,—Jagat Mohini having been commissioned by Kasiswari Devi to take the *paita* and the *Ganges* water, the latter from Burdwan House,
- (8) Also, demonstrations of grief by a trusted servant of the Kumar, Sarif Khan, and a near relation Barendra Chandra Banerjee who performed the "Mukhagni",
- (9) Generally, the atmosphere of publicity surrounding the whole transaction

These are the facts which the defendants set out to prove, and if they were proved, they would undoubtedly establish the whole of their case

The evidence is wholly oral, and quite naturally the defendants try to support the statements of those who may be considered to be partisan or prejudiced witnesses by the evidence of as many disinterested persons as they can. Among such independent outsiders, they evidently reckon the four persons whom the learned judge has singled out for special treatment, namely, R N Banerjee, Jagat Mohini, Gita Devi and Haran Chakladar

So far as Gita Devi is concerned, the real importance of her evidence lies in her supposed corroboration of R N Banerjee's presence in the procession, which requires the procession to have passed along the Thorn Road route to make it possible for her to have noticed her brother-in-law in it from her house "Balen Villa" which lay on this route, this being in fact the only circumstance which lends significance to the question of route.

Kasiswari Devi who is said to have gone over to "Step Aside" that morning directly she got the news of death from Jagat Mohini, and is also supposed to have been visiting the Kumar every day during his illness with R N Banerjee, then a young lad of 17, is unfortunately dead, and not unnaturally is her unavoidable absence from the witness box sought to be made up for by her daughter-in-law and the youngest son

JUDGE'S FINDINGS

It will perhaps be helpful to state at once the findings of the learned judge on some of the questions indicated above. These are —

- (1) That the story about the body being upstairs, clasped by the Rani, until taken away from her at about 7-30 or 8 the next morning, is an utter falsehood (*Vol 18, p 387, II 33-34 and p 388, II 5-7*),
- (2) That the body was in a room downstairs, and was seen by Dr Pran Krishna Acharyya, covered up from head to foot, when he came over in the morning,—a visit which is admitted by the defendants, though the purpose of it is in dispute (*ibid, p 387, II 25 and 39 and II 21-22*),
- (3) That not a soul came to "Step Aside" at night after 9 P.M. on the 8th May, but men were sent for and came from the

- Sanitarium or the Catchery Building the next morning (*ibid*, p 385, ll 9, 22, 23 and 36-37),
- (4) That Kasiswari Devi did not come in the morning (*ibid*, p 385, ll 37-38 and p 388, ll 10-11), nor was Jagat Mohini sent out to the *sasan* (*ibid*, p 389, l 24), the story about her being asked to take the *paata* and the Ganges water there being a pure invention (*ibid*, p 389, ll 34-38),
 - (5) That R N Banerjee was also not at "Step Aside" that morning (*ibid*, p 384, l 42 and p 385, ll 37-38), nor was the procession seen by Gita Devi from her house, as it never passed that way but followed the Commercial Row' route (*ibid*, p 390, ll 29-33 and p 391, ll 4-6),
 - (6) That R N Banerjee really left for Kurseong that morning for the *Kakina sadh* (*ibid*, p 386, l 3),
 - (7) That no rites were performed at the *sasan*, and the body was burnt up without being stripped of its clothing (*ibid*, p 389, l 39 and p 392, ll 14-15),
 - (8) That the procession was made only too ostentatious on purpose, —pice scattered, reversed arms and so forth (*ibid*, p 385, ll 39-42)

As regards the demonstrations of grief at the *sasan*—Sarif Khan trying to throw himself on the burning pyre and Barendra Chandra Banerjee rolling on the ground in grief—he held these facts were admitted by the plaintiff's witnesses (*ibid*, p 379, ll 21-24)

It is not difficult to see that these findings, if it is possible to accept them as correct, are enough to dispose of the defendants' case of the morning cremation completely. The question then is, first, whether in arriving at these findings the learned judge considered all the material evidence, and secondly, whether his conclusions are justified on such evidence. In other words, all that Mr Chaudhuri is entitled to demand is that the findings should be tested in the light of the whole body of evidence on the record.

This evidence, it should be noted, does not consist merely of the statements of the defence witnesses, but includes also the testimony of witnesses on the plaintiff's side, far out-numbered as they are by those of the defendants. Mr Chaudhuri claims that the defence evidence is all one-sided and remains uncontradicted, whereas the plaintiff only seeks to raise suspicion by the evidence he has called. One has, however, only to read the short and simple deposition of the plaintiff's first witness, Dr Pran Krishna Acharyya (*Vol 1, pp 194-199*), to see what devastating effect it has on a not inconsiderable part of the defendants' case regarding the morning cremation, bolstered up as it is by an army of witnesses. This evidence is indeed quite definite, and effectively disposes of the story, which is a vital part of such case, that the body was that of the second Kumar, and that it lay at "Step Aside" with the face exposed till it was borne away to the *sasan* some time after 8 A M.

DEVASTATING EFFECT OF DR PRAN KRISHNA ACHARYYA'S EVIDENCE

It is worthy of special note that the evidence was given long before the defendants came out with the particulars by means of which they sought to establish their case, Dr Acharyya being not merely the first witness for the

plaintiff, but the very first person to depose in the suit itself, the earliest witness on the defendants' side Shyamadas Banerji (*Vol 1, pp 255-278*) not being examined until about three months later

It is just as well to call attention to Dr Acharyya's evidence at once, of which the learned judge has given a very correct analysis in his judgment (*Vol 18, pp 386-387*), and which makes it quite clear —

- (1) that early on the morning of the 9th May at about 6 A.M. Dr Acharyya received a call from a person looking like a nurse (whether it was Jagat Mohini or Mangli does not matter), who gave him a message regarding the second Kumar, which made him go over at once to "Step Aside" with a stethoscope (*Vol 1, p 195, ll 1-6, l 12 and p 197, ll 31-37*),
- (2) that whatever the actual terms of the message were, Dr Acharyya got the impression that the patient was either dying or had just died, and he was expected to pronounce death (*ibid, p 197, ll 22-24 and 26-29*),
- (3) that Dr Acharyya had not received any authorised call for the Kumar's treatment (*ibid, p 195, ll 1-2*),
- (4) that on going to "Step Aside", he saw a dead body "completely covered" (*ibid, p 195, l 17 and ll 25-27, p 198, l 22, ll 23-24 and l 25*), and his impression was he saw it on a bedstead (*ibid, p 195, l 29*),
- (5) that he tried to uncover the body and examine the heart with the stethoscope to see if life was extinct, but was peremptorily warned off by the people there on the ground that he was a Brahmo and the body was that of a Brahmin (*ibid, p 195, ll 18-23 and p 197, ll 1-5*)

ATTEMPTED EXPLANATION OF HIS VISIT

There was not a word in the cross-examination even remotely challenging any of these facts,—nothing to suggest that Dr Acharyya did not come to "Step Aside" that morning, or that the body he saw was not fully covered up, or that he did not want to examine the body, or that he was not prevented from doing so. All that was put to him was if it was not quite natural for a member of a Brahmin family to object to a Brahmo touching the dead body of a Brahmin (*ibid, p 196, ll 1-3*). In other words, the facts were admitted, only an excuse was sought for the act of unceremoniously turning away the doctor after calling him in,—and he it added, a false excuse at that, as on the defendants' own showing no objection was raised to Calvert examining the body and pronouncing it dead. One wonders if by their standard the touch of a Brahmo, though still a Hindu, would pollute, but that of a non-Hindu would purify!

Dr Acharyya's presence at "Step Aside" being admitted, Mr Chandhuri was really in a difficulty in finding some explanation to account for it, and yet it is clear that the purpose for which the doctor was brought there has a very material bearing on the defendants' case.

If he came on a professional visit, it would almost make it certain that the body he saw was not that of the second Kumar, for supposing the Kumar had died at mid-night, no one would think of getting a new doctor the next morning to examine his body, specially as the defendants say

Calvert and Dr Nibaran Sen were both in attendance at the time of death. This was realised by the defendants themselves, who accordingly tried to run away from this position, as is in fact shown by a question they put to Dr Acharyya suggesting that some other qualified doctor might have declared the patient dead before his arrival (*ibid*, p 197, ll 18-19), to which the witness simply replied that this was more than he could say (*ibid*, l 20)

The only other suggestion, not put to the witness, but which Mr Chaudhuri put before us, was that Dr Acharyya must have been summoned casually as a *sasan-bandhu*, just as others had been—that is to say, to assist in carrying the corpse to the cremation ground, which would pre-suppose his being told that the Kumar had died. In the first place, however, he would not in that case have come hurrying to "Step Aside" with his stethoscope. Secondly, as the learned judge points out, being a Brahmo, Dr Acharyya would have been "useless for cremation purposes" (*Vol 18*, p 387, l 23), and he would have himself told so to the person who went to call him, for, as he says in his evidence, he knew that it was a custom among Brahmins not to allow a Brahmo to carry the dead body of a Brahmin (*Vol 1*, p 196, ll 28-30). Thirdly, it is unthinkable that if he was requisitioned as a *sasan-bandhu*, he should have been allowed, stethoscope in hand, to go upstairs, where according to the defendants the dead body had been lying in the clasp of the second Ranı. There is no evidence that any of the other new-comers went or were taken to the first floor that morning, except perhaps for the purpose of bringing down the dead body, the evidence is really the other way. Rajendra Nath Sett definitely says he did not go upstairs (*Vol 1*, p 309, l 30), while Mohendra Nath Banerjee states that none of the Secretariat people went inside the house (*ibid*, p 327, ll 14-15), and Nalindra Nath Ghose also speaks to the same effect (*ibid*, p 402, ll 33-34). Nor can one forget in this connection Satyendra's statement that "it was not possible for Ram Sing Subha to come upstairs into the Kumar's bed-room when the Ranı was also there" (*Vol 16*, p 431, ll 10-11).

Mr Chaudhuri at one stage drew the picture of Dr Acharyya going upstairs to see the body and the Ranı quietly moving away for a few minutes to facilitate his coming, but this would imply a deliberate act on the part of the people at "Step Aside" in taking him there, which would of course be the last thing the defendants would admit.

Satyendra, it will be remembered, did not even know the name of Dr Pran Krishna Acharyya of Calcutta at the time he was in Darjeeling (*Vol 16*, p 479, ll 28-29),—though on being confronted with a passage from the doctor's evidence, he was willing to concede that his visit was "not impossible, but highly improbable" (*ibid*, p 479, ll 33-34),—and Bibhabati on her part did not recollect anybody coming to examine the body before it was taken downstairs (*Vol 12*, p 248, ll 37-38), while Jagat Mohini had not heard the name of Dr Acharyya even when she was deposing, nor seen if there was a house at all below and near "Step Aside" (*Vol 1*, p 296, ll 3-5).

It is significant that none of the witnesses on the defendants' side are willing to admit the presence of Dr Acharya. In fact, if I am not mistaken, those who say they were at "Step Aside" that morning are almost all without exception anxious to disown him. Thus, to pick out a few such witnesses, Shyamadas Banerji says he heard the name of Dr Pran Krishna Acharyya of Calcutta but did not know him (*Vol 1*, p 271, ll 10-11).

Rajendranath Sett speaks to the same effect, being good enough only to add that he was a "big doctor" (*ibid*, p 309, l 41—p 310, l 2) Mohendra Nath Banerjee likewise never saw him, but only heard of his name as that of "an eminent physician" (*ibid*, p 338, ll 19-21) Professor Haran Chandra Chakladar was in a somewhat better position, for he knew him and knew his face as well, and also that he was "a renowned doctor of Calcutta", but neither did he have his acquaintance nor did he remember if the doctor was at Darjeeling at the time (*ibid*, p 387, ll 12-15) Kshetra Mohan Bhattacharya, who says he was putting up at "Mall Villa" and got the news of death at about 4 or 5 A.M., merely vouchsafes the information that Dr Acharyya was staying in another part of the same house in a room close to his, but separated by a tin wall (*ibid*, p 428, ll 14-15) Birendra Chandra Banerjee (D W 290) heard Dr Acharyya's name first as a witness in this case (*Vol* 15, p 355, ll 3-4), only the day before he himself gave his evidence, which, however, awakened in him no curiosity to know what the doctor had said (*ibid*, p 332, ll 24-32), for he was sure that any evidence which conflicted with his, was bound to be false or mistaken,—save and except that of Ram Bibhabati (*ibid*, ll 32-35) Dr Ashutosh Das Gupta, presumably because he was a doctor himself, knew the name of Dr Acharyya for a long time, from even before the Darjeeling trip, though not of course as a big doctor, but he never saw him and never heard he had come to "Step Aside" he is definite that he did not see him on the 9th May (*Vol* 16, p 327, ll 3-10)

PLAN MISCARRIES

Look at the matter from any point of view one may, there is to my mind no possible escape from the conclusion that the summoning of Dr Pran Krishna Acharyya to "Step Aside" was not and could not have been a casual act, but had a definite purpose behind it, a purpose, however, which Nemesis caused to miscarry,—that which was designed to serve as valuable evidence in their favour turning out to be the most damning circumstance against those who had planned this ingenious move And it is thus that accounts for the studied reluctance of the defendants through their witnesses to admit the visit, far less to face it, though it could not be denied in the cross-examination of the witness himself

Mr Chaudhuri stressed it with some force that it was not necessary to call in Dr Acharyya to prove the existence of a dead body at "Step Aside" that morning, as the cremation procession itself which was to follow would have been quite enough for the purpose He was perfectly right, but he was wrong in supposing that it was ever the plaintiff's suggestion that this was the purpose The real object must have been to create independent evidence after the *fiasco* of that night, not of the presence of a dead body, but of the presence of *the* dead body of the second Kumar, and this could be easily and effectively achieved if Dr Acharyya could be made to give a death certificate It was obviously out of the question to approach either Calvert or Dr Nibaran Sen for such a purpose

Dr Acharyya no doubt said, and he it noted he did so in his examination-in-chief, that nobody asked him for a death certificate (*Vol* 1, p 195, l 39), but this was only because the Brahmo doctor must have caused a shock and a surprise by his refusal to take things for granted and his

insistence on examining the body for himself,—a rude reminder to those who wanted him how

“The best laid schemes o’ mice and men
Gang aft a-gley”

Dr Pran Krishna Acharyya, who it may be stated is no longer living, was in fact a well-known medical practitioner of Calcutta in those days and a man of unimpeachable integrity, whose credit or veracity even Mr Chandhuri dared not assail

He is one of the persons from whom Lindsay obtained a statement in 1921, though it is not clear how Lindsay got his name, if neither Satyendra nor any of the “Step Aside” witnesses of the defendants had known of his visit. As I have pointed out in an earlier portion of the judgment, Lindsay was writing to Lethbridge on the 10th June, 1921, to get a statement from Dr Acharyya among others, and Lethbridge arranged to send for him (*Ex 439, Vol II, p 241*). Rai Bahadur Sasanka Coomarr Ghose, however, appears to have seen the witness later, and Lindsay thought it fit not to trouble him any further (*Ex 440(a), ibid, p 248, ll 1-2*). All the same Lindsay sent him a questionnaire on the 13th August, 1921, when Dr Acharyya was at Mnssoori (*Ex Z(335), ibid, pp 258-259*), and the latter sent him a reply (*Ex Z(334), ibid, p 260*).

FUTILE CRITICISM OF EVIDENCE

Mr Chaudhuri tried to shake Dr Acharyya's evidence by reference to two of his answers to Lindsay, but the attempt was as feeble as it was futile

Q 4 was in these terms

“Did you know the Kumar before?

“If not, did you see the body after death?

Please give a description of the body as far as possible”

The answer was “No Yes I have altogether forgotten his features”

The argument was that he could not have forgotten the features unless he had seen them, and it was said that his present statement that he saw the body fully covered up was, therefore, demonstrably incorrect. But the fact is overlooked that Dr Acharyya was living close to “Step Aside” and knew that the second Kumar was staying there (*Vol I, p 195, ll 7-9*), and it was not at all unlikely for him to have had opportunities of viewing the Kumar there or on the road, as so many defendants' witnesses say they had done. Mr Chandhuri drew attention to his statement in the evidence “I did not meet him there while he was alive, nor had acquaintance with him” (*ibid, p 194, ll 31-32*). The translation in the printed record is misleading: the deposition was in Bengali and the original words mean that “he had no interview with the Kumar in life,—he had no acquaintance with him.” Definitely, the witness did not say that he had not seen the Kumar before his death. In any event it will be seen that this particular answer was not put to him at all in cross-examination.

He was, however, cross-examined with reference to his answer No 8 which he had sent to Lindsay “I saw sons of Mr M N Banerjee, Government Pleader, making arrangements for cremation” (*Vol II, p 260, ll 22-23*). This was in reply to the question “Can you remember the

name with address, if possible, of any person who to your knowledge was present either at the death or with the funeral procession or at the cremation?" It was said he was making a different statement now, for he stated that at the time he was speaking of, he knew Mr M N Banerjee, the Government Pleader of Darjeeling, but not his sons whom he came to know afterwards (*Vol. I, p 198, ll 2-4 and 7*) But on his being reminded of his previous answer, he still adhered to this statement, and added quite frankly "I do not think that it was right for me to write "saw" in the said answer of mine There is in the question, "to your knowledge" I came to hear later on that they were there I wrote "saw" for that reason" (*ibid, p 198, ll 37-39*) As regards cremation arrangements, what he saw was the dead body covered up, from which he understood that it was about to be taken out for cremation, and he explained that this was all he meant when he said, even before he was shown his former answer, that on going over to "Step Aside" it appeared to him that arrangements were then being made for cremation of the dead body (*ibid, p 197, ll 38-39 and p 198, ll 21-27*) The explanation seems to be quite natural, and I see nothing in his evidence which is really contradicted by the statement he gave to Landsay

Apart from the fact that his story was in substance left unchallenged in cross-examination, there are at least three unerring indications in the evidence itself which show that he could not but be speaking the truth First, his statement that nobody asked him for a death certificate (*ibid, p 195, l 39*) if the plaintiff got him there to give false evidence, he could be easily made to say that such a certificate had been asked for from him Secondly, his statement that a nurse went to call him (*ibid, p 195, ll 2-4 and p 197, ll 33-34*), this being a fact which he could not anticipate would be quite consistent with the defendants' own case that a nurse was sent out to fetch people to "Step Aside" that morning Thirdly, his statement that he did not know who asked him not to examine the body, or who was the Kumar's brother-in-law (*ibid, p 195, ll 23-25 and p 197, ll 4-5*) particulars which he need not have withheld, if he was giving tutored evidence

It is again worthy of note that he did not pretend to remember the details of that day's incidents he said so in his statement to Landsay (*Vol II, p 260, ll 10-11*) as well as in his present evidence (*Vol I, p 197, l 1*) Still he had good reason to remember the occasion, as it did appear to him "a little strange" that he should not be allowed to examine the body (*Vol II, p 260, ll 24-26*), and he was "a little piqued" at this (*Vol I, p 197, l 3*)

UNCONVINCING SUGGESTIONS

It seems to me difficult to accept Mr Chaudhuri's theory that Dr Acharyya took his stethoscope with him for nothing, and wanted to examine the body without being asked by anybody to do so If, as the defendants say, the body was lying upstairs, such officious conduct would really be impossible on his part This case was in fact not put to the witness at all, but all that he was asked was if he knew the person who told him not to touch the body (*Vol I, p 197, ll 4-5*) On behalf of the plaintiff, however, it

was put to Satyendra if such a thing could have happened, and his answer was, as usual, characteristic

"Q—Could any doctor be asked on the 9th morning to feel the Kumar's pulse or examine him without your knowing it?

A—May be

Then says, but it is hardly probable

Q—Do you know that he has deposed that he came to the "Step Aside" on the 9th morning, saw a covered up body and wanted to feel its pulse and otherwise examine it—do you say such a thing could have happened?

A—Could have Cannot say one way or the other If such a thing did happen, it did not happen in my presence" (Vol 16, p 448, ll 1-9)

An important question to consider in connection with Dr Acharyya's evidence in fact is where he saw the dead body at 'Step Aside', upstairs or downstairs Neither side asked him definitely about it, but in his examination-in-chief he stated that the dead body was on a *bed-stead*, adding that this was his "impression" (Vol 1, p 195, l 29), and there was no cross-examination on the point "Impression" of course is not memory, but if it be supposed that his recollection was inexact and he actually saw the body lying on the floor, the defendants must face the fact of his going upstairs and account for it, which, as I have said, they cannot do without entangling themselves in insuperable difficulties To take Dr Acharyya upstairs would indeed be not only a meaningless, but a suicidal move on their part Seeing the body on a *bed-stead* might be mere "impression", but not so his seeing it fully covered, about which he was as definite as any honest witness could be, and it is the defendants' positive case that the body was not covered while it lay upstairs All indications, therefore, in the evidence seem distinctly to point to Dr Acharyya's "impression" being as good as true recollection, and it follows that he must have seen the body downstairs,—not, however, in the yard outside where, according to the defendants, it was not removed till about 8 A.M., but inside the house, Satyendra himself saying that it was not his case that any doctor examined the body while it lay on the *khatia* in the yard (Vol 16, p 541, ll 1-2) Birendra Chandra Banerjee also admits that if anybody says that on the morning of the 9th he saw the dead body on a *khat*, he could not possibly have seen it upstairs (Vol 15, p 362, ll 18-19)

IF DR ACHARYYA SAW BODY UPSTAIRS

If, according to the defendants, the body was upstairs, when Dr Acharyya saw it, one wonders why this case was not put to the witness, nor was he asked a single question as to whether he noticed the second Ram there or not Mr Chaudhuri called attention to a question put to one of the defendants' morning cremation witnesses, Durga Charan Pal, D.W. 57, which he said showed that it was the plaintiff's case that the body was upstairs at the time

"Q—Supposing he (Dr Acharyya) had said that he had seen the body at 6 A.M. or so, fully covered up, he must have seen the body upstairs?" (Vol 13, p 149, ll 8-9)

Learned counsel evidently mis-read the question, which only meant to ask if Dr Acharyya's evidence would not imply such a conclusion on the

defendants' case, the object being to contradict that case by this evidence. It is ridiculous to suppose that at the stage when this witness was being examined, the plaintiff should, for no reason whatever, be suddenly making a change of case on such a vital point. In point of fact, the same suggestion was put later to Dr Ashutosh Das Gupta, who of course said that such a thing as Dr Acharyya or anybody examining, or wanting to examine, the body after death did not only not happen, but could not possibly have happened (*Vol 16, p 288, ll 5-14*)

On the question as to whether the body was upstairs or downstairs on the morning of the 9th May, it is instructive to refer to the evidence of one of the defendants' own important witnesses Mohendra Nath Banerjee (*Vol 1, pp 323-346*), which wholly destroys the case sought to be made through other witnesses to the effect that the body was brought down from the first floor by the wooden staircase at the northern end of the building, and then carried along the whole length of the road-side verandah on the ground floor, and finally deposited on a *khatia* in the yard outside. As the learned judge points out (*Vol 18, p 382, l 39—p 383, l 1*), and as is clear from the evidence of Kalu Satri, D W 75 (*Vol 13, pp 270-281*), whose description of the lay-out of "Step Aside" both sides accept as correct, the staircase led into this ground floor verandah from the glazed verandah on the top of it (which is marked No 6 in the rough sketch given by the learned judge in his judgment, *Vol 18, p 311*). If the body was lying upstairs, there could evidently be no question of bringing it out of any of the ground floor rooms in carrying it to the *khatia* outside. Mohendra Nath Banerjee, however, says quite explicitly "*The dead body was brought out from the room attached to the verandah*" (*Vol 1, p 327, ll 13-14*). There is absolutely no ambiguity in this evidence, and no mistaking the "room" or the "verandah" he means, to which in fact he frequently refers in other parts of his deposition. I am wholly unable to accept Mr Chaudhuri's suggestion that the original deposition in Bengali shows anything to the contrary, or that the learned judge mis-read the same (*Vol 18, p 387, ll 35-37*). I have read it myself more than once, and most definitely, it does not show that the "room" meant the road-side verandah, and the "verandah" meant a ledge projecting from the outer door of the house into the compound and leading down to it by a short flight of steps, as counsel wanted to say. Such a projection beyond the outer door would not be described as a verandah in the lower storey (নীচের ভালায় বারান্দা) (*Vol 1, p 326, l 41*), and no such projection actually existed. Kalu Satri's evidence shows that the compound outside, the inner verandah and the rooms opening into this vestibule were all on the same level (*Vol 13, p 272, ll 14-16*), and that is also what D W 86, Narendra Nath Mukherjee, says in cross-examination (*ibid, p 197, ll 7-8 and ll 14-15*) as well as in re-examination (*ibid, p 198, ll 1-2*).

Mohendra Nath Banerjee in fact makes it quite clear that the "verandah" he was speaking of was the road-side verandah, where he and others had been waiting (*Vol 1, p 327, ll 2-6*), and that the body was brought out from the inner apartments to this verandah from where it was borne away on a *charpoy* or *khatia* (*ibid, ll 19-20, 23-24, 26-27, 28-29 and 37-38*). He puts the matter beyond doubt when he says later that "the verandah, and the room from which the body was taken out to the verandah were of the same level" (*ibid, p 330, ll 29-31*). His statement that "he did not enter inside" (*ibid, p 326, l 41*) only means that he did not get into any of the inner rooms, not that he was waiting outside in the compound.

The learned judge apparently takes the view that Bijoy Krishna Mukherjee's evidence on the point was the same as that of Mohendra Nath Banerjee (*Vol 18, p 387, ll 37-38*), but I agree with Mr Chaudhuri that he is wrong in so thinking. Bijoy Krishna Mukherjee no doubt spoke of the dead body being taken through the "room" in which he was seated, but reading his evidence, it is clear that by "room" he only meant the vestibule which it appears was used as a waiting hall on the occasion (*Vol 1, p 317, ll 30-31*)

FACTS ESTABLISHED

Dr Acharyya's evidence thus establishes three broad facts —

- (1) that he was summoned to "Step Aside" at about 6 A.M. on the morning of the 9th May,
- (2) that he saw there a fully covered up dead body, and
- (3) that he saw it downstairs

As it is nobody's case that there were two dead bodies in the house at the same time, the body he saw must have been either that of the second Kumar or of some other person. The first alternative is, however, ruled out by—

- (1) the hour of his call,
- (2) the purpose for which he was called, which could not be that of acting as a mere *sasan-bandhu*, and
- (3) the false excuse by which he was stopped from lifting the cover and examining the body

It will be seen, therefore, that the evidence is neither "colourless", nor does it stop short at "raising suspicion merely" it really cuts across vital parts of the defendants' case made by their witnesses regarding the morning cremation,—the body remaining upstairs in the clasp of the second Rani, and the face lying exposed at "Step Aside", and in negating these facts, also sweeps away the evidence of recognition of the face before the body was carried out of the house

HOW FAR REBUTTED BY DEFENCE EVIDENCE

The question is whether it can be said on the other hand that Dr Acharyya's testimony is itself repelled by this body of defendants' evidence, which is indeed wholly contradictory to it

The decisive consideration is that Dr Acharyya's evidence in its essential parts is admitted by the defendants,—that some one from "Step Aside" went and called him that morning, that he saw a covered dead body there on his arrival, and that he was not allowed to touch the body on the ground that he was a Brahmo facts which are wholly incompatible with the story told by the defendants' witnesses

That story may all the same be examined, in so far as it purports to describe the scenes after death in the room where according to the defendants the Kumar's dead body lay the whole of that night till it was removed downstairs the next morning

BIBHABATI'S ACCOUNT OF INCIDENTS ON NIGHT OF DEATH

Bibhabati's account in her examination-in-chief is thus

"After the second Kumar's death, my brother and I and the two nurses, the two maid servants were in the room Ashu Doctor and

Birendra and Mukunda were coming and going I remained in the room—passed the whole night there Whether Satyendra, my brother, was there all the time I do not remember, but I was there until the corpse was taken down next morning The Kumar's dead body lay all night on the bed on which he had died I had thrown myself on his bed and was weeping" (*Vol 12, p 204, ll 4-10*)

In cross-examination she says

"I was awake all night till the body was taken downstairs Many people—outsiders, my Mama (maternal uncle) and Kasiswari Debi—came into the room in the morning before the body was taken downstairs My mama was Surja Narain Babu His, Kumar's body was covered, but the face uncovered before the body was taken downstairs Sometimes people would cover up the face too, but I would uncover it from time to time I do not remember anybody who wanted to examine the body before it was taken downstairs" (*ibid, p 248, ll 31-38*)

Again,

"I cannot swear at what precise hour of the clock the Kumar's body was taken downstairs I can swear that the body could not have been taken down before 7 A M It was taken down long after it was light" (*ibid, p 262, ll 1-3*)

She denies that she was removed from her husband's room on account of her fainting fits in the day-time of the 8th May and never saw him again after that all that she saw on the next morning was a covered body downstairs while she was upstairs (*ibid, p 278, ll 3-12*)

So the Rani was awake the whole night, throwing herself on her husband's bed and keeping a constant watch over his dead body, without any fainting fits

"Fainting fits" that night would of course be a dangerous admission, and she must, therefore, not only deny this, but go the length of denying the fact mentioned by her mother in a letter, that she suffered from epilepsy (*Ex 300, Vol I, p 37, ll 21-22, and Vol 12, p 259, ll 13-21 and p 277, l 39—p 278, l 18*)

SATYENDRA'S EVIDENCE

Satyendra's evidence may now be referred to This is what he says in examination-in-chief

"After the second Kumar's death his corpse remained in the room in which he died It remained there until the body was taken down next morning Before it was taken downstairs it was not left alone Bibhabati remained there I was there for the rest of the time, the nurses were there, the maid servants were there, one or two men servants were there and other officers coming and going" (*Vol 16, p 429, ll 22-27*)

Again,

"The dead body was brought downstairs at about 8 o'clock in the morning, about 7-30 or 8 A M on the day following the death" (*ibid, p 429, ll 37-38*)

"When the body was brought down and placed on the *khat*, the face was uncovered until it was finally covered with a shawl when the dead body was brought down, the second Rani was with the body" (*ibid*, p 430, ll 5-9)

Then, in cross-examination he expresses himself as unable to say whether he was upstairs or downstairs all the time the Kumar's body lay in the room on the first floor (*ibid*, p 447, ll 35-36), evidently to leave a loop-hole for Dr Acharyya's presence upstairs to examine the body, without, however, admitting the fact. He remembers he had no sleep at all that night. At about 3 o'clock in the morning he got downstairs when some people came. Between then and the time the dead body was brought into the yard, he had to go up and down many times. He has no recollection if anybody told him that a doctor wanted to examine the Kumar's body (*ibid*, p 480, ll 7-12)

The evidence so far is not inconsistent with that of his sister, except that he would not wholly exclude Dr Acharyya's coming to examine the dead body, as she attempts to do

An hour or so after the Kumar's death, he sent "chits" to people he knew at the Sanitarium and at the Cutchery Building (*ibid*, p 429, ll 9-12 and p 478, ll 20-29)

It is instructive now to compare the account he gives with what he records in his diary. Thus, under date the 8th May

"Bibha began to have fits. The doctors melted away. Only two nurses remained. Sarif Khan was mad. Sent *Behara* for Sejomania, who came at about 3 in the morning. Message to Uttarpara and Jdpore. Sent man to the Sanitarium for men to get the corpse removed for funeral" (*Ex 399(1), Vol I, p 306, ll 11-14*),

and under date the 9th May

"Sett with men from Sanitarium arrived. M N Banerjee's son Balen, Phatick (same as Anukul Chatterjee), Shyamadas arrived. With difficulty removed the body covered in silks, shawls and flowers" (*Ex 399(2), ibid, p 307, ll 3-5*)

BIBHABATI'S "FITS"

He knew that the diary-entry about his sister's "fits" had been put to her in cross-examination, and so he tried to recall the incidents, still he "failed to remember any fit" (*Vol 16, p 431, ll 13-24*). But when he was cross-examined about it himself, his memory seemed to recover from its obsolescence, and being confronted with the entry, he said "This must have happened. I recall now that this did happen. I remember she had her first fit after the Kumar's death" (*ibid*, p 499, ll 31-32). He struggled hard, however, against any suggestion that his sister might have lost consciousness, and ended by saying "Bibhabati had what a Bengalee would call 'fits'" (*ibid*, p 500, ll 20-27), by which he apparently meant "a temporary dazed state, a state of temporary speechlessness or perhaps lock-jaw due to sudden shock" (*ibid*, ll 2-4 and 17-19). All that he remembered was that "she would cry for some time and stop, and cry again, stop and remain motionless and cry again" (*ibid*, ll 14-16), though he did not say that she was in "hysterical fits" (*ibid*, l 4).

In spite of Mr Chaudhuri's suggestion that Satyendra in his diary must have been referring to mere hysterical fits and weeping, the studied equivocation of the witness in the box leaves no doubt in my mind that Bibhabati must have had such "fits" that night, whether of the "Bengalee" variety or not, as to put an end to the story of the Rani hanging on to the dead body all through the night

OTHER EVIDENCE

A most graphic description of this story comes from Jagat Mohini, according to whom, from the moment the doctors "melted away" after the death of the Kumar, the Rani kept on clasping the body in her arms, she and Mangli in their turn clasping the Rani (*Vol 1, p 282, ll 4-6, 17-18, p 283, ll 20-22, 25-27, 33-34, p 290, ll 33-35, p 294, ll 40-42*)

The account is perhaps surpassed only by Shyamadas Banerjee who on arrival at "Step Aside" that night saw his cousin sister weeping, "placing her face upon the face of the Kumar" (*Vol 1, p 256, l 30, and p 263, ll 37-39*) He went into the Kumar's room at 1 or 1-30 A.M., and up till morning, so long as he was there, it was only Bibhabati who remained in the room (*ibid, p 270, ll 9-15*)

Dr Ashutosh Das Gupta is surprisingly restrained, and merely says that the Rani was in the room in which the dead body lay (*Vol 16, p 243, ll 34-35*)

Bepin Behari De, the khansama, was with the dead body until it was taken downstairs,—it may be he left the room occasionally for a minute or so (*Vol 14, p 499, ll 1-3*), but he speaks of the Rani clasping the dead body only at the time it was sought to be taken away from her the next morning (*ibid, p 492, ll 4-6*) He indeed gives a vivid picture of this morning scene the Rani's maternal uncle and the Government Pleader's wife and one or two other ladies forcibly tore her away from the dead body, and she in her turn tore herself away from those who were holding her, trying to dash out of the room and follow the body downstairs (*ibid, p 492, ll 6-14*)

Brendra Chandra Banerjee, the man who could check his tears at the mention of his father's death but not when speaking of the death of the Kumar (*Vol 15, p 325, ll 10-11 and p 320, l 34*), also contents himself with saying that the Rani kept hold of the body until it was forcibly taken away from her in the morning (*ibid, p 319, ll 37-40*)

R N Banerjee, who is said to have arrived only in the morning, naturally speaks only of "the violence of the Rani who wanted to throw herself on the body and was not permitting it to be removed downstairs" (*Vol 3, p 121, ll 24-26*)

For the purposes of the defendants' case it is doubtless necessary to keep the Rani and as many others as possible in the Kumar's room from midnight to morning, but the fantastic details which some of the witnesses like Jagat Mohini and Shyamadas Banerjee try to weave into the story, perhaps to give it an added touch of verisimilitude by making it as circumstantial as they can, seem to me only to demonstrate its essential untruthfulness. It is also falsified, as I have said, by the entry in Satyendra's diary and the admission wrung out of him in the witness box regarding Bibhabati's fits, he being in fact the last witness on the defendants' side to speak about the incidents at "Step Aside" on the night of the Kumar's death. None of the witnesses before him, be it noted, even drop a hint about the "fits", a fact the significance of which it is impossible to miss as clear indication of a deliberate attempt to suppress the truth

SATYENDRA'S ACCOUNT IN HIS DIARY

The diary, as I have held before, was written by Satyendra for a purpose, though he did not disclose its real object, and I fully believe that he started writing it about the time he left Darjeeling or shortly thereafter, as soon indeed as it occurred to him to keep a written record of the story as he thought it might be shaped, suppressing and altering only so much of the facts as was necessary to wipe out the evening cremation and at the same time produce a consistent account. The hour of death is necessarily advanced to midnight, but the diary as regards the Darjeeling entries is still a revealing document, some of the facts as they occurred in connection with death at dusk being fitted into the frame-work of death at midnight. These facts, though recorded under the same date as the entry about death at midnight, are yet not necessarily parts of the same story, and it should be possible, therefore, for the plaintiff, while rejecting the statement about death at midnight, to use some of the other entries as corroboration of his own case, particularly when the writer of the diary shows himself anxious in his evidence to explain away, if not disown, the same.

The diary is thus, in my opinion, very good and useful evidence of the fact that Bibhabati did have fits after the Kumar's death, whether this event occurred in the evening or at midnight, just as it also furnishes unexpected corroboration of the plaintiff's story that Satyendra did send a messenger to the Sanitarium to collect men for a night cremation, and not mere "chrits" to give the news of death, without any request to anybody to come over at once, as he so strenuously sought to maintain in his evidence as an after-thought,—only that according to the diary this is supposed to have been done after midnight.

Nobody would suggest for a moment that in writing the diary Satyendra was trying to create evidence in his own favour in anticipation of future trouble. His main object must then have been only to make up a consistent story to keep before himself, which he did accordingly, as much by *suggestio falsi*, as by *suppressio veri*, producing in the result a mixture of truths, half-truths and untruths. It is not at all surprising, therefore, that the diary not only falls short of providing against the exigencies of this case as they have actually arisen, but remains his handiwork to bear witness against himself. Thus does many a calculating criminal often give himself away by his very efforts to screen his own misdeed: he covers up his track, but only with a sheet of snow which the lapse of time causes to melt away.

ARRIVAL OF SASAN-BANDHUS

Apart from the Ran's fits there is another important particular in respect of which Satyendra's diary is clear refutation of the defendants' evidence, discrepant as it is, by a document which is virtually their own, while affording strong corroboration of the case made by the plaintiff. It is as regards the time of arrival of the *sasan-bandhus* for the morning cremation, whether from the Sanitarium or from the Cutchery Building.

The defendants would naturally be anxious to bring them into the house as soon after midnight as possible, not only to support the story of the Ran remaining with the dead body all through, but by the very fact of their presence to render the introduction of another corpse from outside before dawn almost an "utter impossibility." At the same time they have to face

the difficulty of having to account for the cremation not taking place at night. Wavering between these two positions, Shyamadas Banerjee is made to arrive from the Cutchery Building, according to his own statement, at 1 or 1-30 A.M. (Vol 1, p 256, l 10 and ll 13-14 and p 270, l 9), while Rajendra Nath Sett from the Sanitarium is brought there "not before 3 o'clock" (*ibid*, p 301, ll 18-19), his companion Bijoy Krishna Mukherjee putting down the time as "probably very early in the morning", "it may be 4 or half past 4" (*ibid*, p 317, ll 16-17).

Shyamadas says he went only with the Uttarpara man Anukul Chatterjee (Vol 1, p 256, ll 13-14), while Rajendra Nath Sett, according to his statement, took with him from the Sanitarium Bijoy Krishna Mukherjee, Tinkari Mukherjee and probably one or two more, but not more than 5 in all (*ibid*, p 103, ll 12-14), and on the way picked up from Cutchery Building about 6 or 7 men, including Anukul Chatterjee, but not perhaps Shyamadas Banerjee (*ibid*, p 303, ll 27-29). Tinkari Mukherjee's own evidence is that he did not go with Rajendra Nath Sett at all, but went the next morning (*ibid*, p 434, ll 17-23 and p 451, ll 26-28). Bijoy Krishna Mukherjee in his turn says that he alone went with Rajendra Nath Sett, and though they called at Cutchery Building on the way, he does not remember if the people there only promised to follow the next morning, or any one accompanied them—probably one did (*ibid*, p 314, ll 27-30 and p 319, ll 26-30).

Satyendra's recollection is that Rajendra, Bijoy and one or two more came from the Sanitarium, and Shyamadas and Anukul came from Cutchery Building (Vol 16, p 429, ll 14-17), all in the course of the night—at about 3 o'clock, as he would prefer to time it (*ibid*, p 480, l 9).

Whatever the conflict in this body of evidence, the case made by the defendants at the trial undoubtedly was that *sasan-bandhus* from the Sanitarium and the Cutchery Building were at "Step Aside" long before day-break, and yet this is the entry in Satyendra's diary under date the 9th May —

"Sett with men from Sanitarium arrived M N Banerjee's son Balen, Phatick (same as Anukul Chatterjee), Shyamadas arrived" (Vol 1 p 307, ll 3-4)

The entry was shown to Satyendra in cross-examination (Vol 16, p 502, l 13), but neither then nor in re-examination did he pretend to explain that though he made the record under "9 Sunday", he was referring to something which had happened the night before,—the explanation which learned counsel would now offer on his behalf, forgetting that when "Sejomama" arrives "at about 3 in the morning", the fact is entered under date the 8th May (Vol 1, p 306, ll 12-13), and forgetting also that Sett, Phatick and Shyamadas are bracketed with Balen who admittedly did not come until long after day-break.

I have no manner of doubt that the fact was as shown in the diary rather than what the witnesses from the Sanitarium or the Cutchery Building are now made to say for a purpose, the need of which had not probably been realised when the diary was written.

It is worthy of note that Jagat Mohini (Vol 1, pp 281-299) did not see any *sasan-bandhus* at the house during the night neither did Dr Ashutosh Das Gupta (Vol 16, pp 240-346), nor Bepin Behari De, the khansama (Vol 14, pp 487-505). Brendra Chandra Banerjee merely states that on the night of the Kumar's death one or two outsiders might have come, but he did not know (Vol 15, p 350, ll 17-18), while Anthony Morel says that "as the

night was far advanced, a sufficient number of people was not available, only 'one or two men came in that night' (Vol 2, p 379, ll. 13-15)

NO NIGHT CREMATION

On the defendants' evidence, it is difficult to believe that if summons had been sent out at night for men to carry the corpse, the cremation could not still be held in the course of the night. Mr Chaudhuri might not see any objection to *bashu-mara*, and Satyendra might now rise above that prejudice, but on his own showing the latter did send for men within a few minutes of death and succeeded in getting together quite a decent number at "Step Aside" long before dawn. Satyendra doubtless attempts an explanation that sufficient men were not forthcoming, and that it was difficult to carry a dead body to the *sasan* at night at a place like Darjeeling (Vol 16, p 429, ll 20-21), but this would be no more than a mere excuse. If a night cremation was difficult or out of the question, he would certainly not have disturbed people in their sleep at the unearthly hour of 1 or 1-30 A.M. merely for the pleasure of giving the news of death, nor would any of them have turned up from the Sanitarium or the Cutchery Building at an hour when their services would admittedly not be required. In point of fact, if one is to believe the defence witnesses, Satyendra was able to collect that night at least Rajendra Nath Sett, Bijoy Krishna Mukherjee, Shyamadas Banerjee and Anukul Chatterjee, if not Tinkari Mukherjee as well, and according to Rajendra Nath Sett, he probably got there 5 or 6 more from the Cutchery Building. Besides these, there were at least 3 Brahmans at the house, Satyendra himself, Birendra Chandra Banerjee and Ambika Chakravarty, the cook. Even if this was not a sufficient number, having regard to the intimate relations which are said to have sprung up between the Kumar's family and that of the Government Pleader, Satyendra had only to send word to "Balen Villa", and Balen and Robin Banerjee would doubtless have rushed to his assistance, however advanced the hour of the night when the call came.

AN UNEXPLAINED FACT

A night cremation, if there was really an occasion for it, would thus be neither impracticable nor improbable. Much as Darjeeling conditions may differ from those of other places, there is evidence on record that cremations have been held here at night, even while raining, thus when Susila Sundari Devi, P.W. 1016, lost her husband in 1921 or thereabouts, the body was removed, as she says, at 3-30 or 4 A.M. "in a hurry in the middle of the rain" for fear of a *bashu-mara* (Vol 11, p 518, ll 37-40),—a fact regarding which she is not cross-examined at all. It is useless for Mr Chaudhuri to refer to the evidence of D.W. 101, Satya Prosad Ghosal, who merely states, without assigning any reason, that though his mother died at about 11 P.M. and his sister at about 2 A.M. at night, they were not cremated until the next morning (Vol 14, p 290, ll 11-16), not that it was not possible to do so in the course of the night, if a sufficient number of men could be procured, and it is equally pointless to rely on P.W. 603 Swami Oankarananda's statement that "at Darjeeling because of the cold climate people carrying a dead body for cremation go with shoes on and in warm clothes, that is, coats or wrappers and dhuties" (Vol 8, p 98, ll 33-35),—a statement which not only does not rule out, but contemplates the possibility of, a night cremation at Darjeeling. D.W. 112, Nanda Gopal Gargari, also does no more than state as a mere fact that his father died at about 9 P.M., but was cremated the

next morning (*Vol 14, p 353, ll 22-23*), and so also D W 402, Sarada Prosad Bhattacharjee who says that Hari Das Mukherjee's brother died at 10 or 11 P.M., but the cremation did not take place that night (*Vol 17, p 209, l 37—p 210, l 3*), neither witness being asked for, or offering any explanation for the delayed funeral except that the latter suggests that attempts to get men generally failed (*ibid, p 218, ll 15-18*) Anup Lal Goswami, D W 411, again, it will be seen, though claiming to be a veteran Darjeeling cremator in the defendants' camp, who would go to the *sasan* "whenever dead bodies of Bengalees were burnt" (*Vol 17, p 303, ll 29-30*), does not say that he never went at night, nor was such a suggestion put to Manmatha Nath Chowdhury, a witness on the plaintiff's side with similar experience (*P W 986, Vol 11, pp 276-283*)

The more one studies the defence evidence regarding the course of events at "Step Aside" on the night of the supposed death of the second Kumar, the more is the painful conviction brought home to one that it is not an honest attempt to lay bare the facts at all, but only an elaborate artifice to screen the truth behind a heavy veil of fiction

I for one refuse to believe on that evidence either the story of the second Ram's night-long vigil over her husband's dead body, or that of any *sasan-bandhus* arriving at "Step Aside" after midnight of the 8th May Neither 'the one nor the other was or could be a fact for the simple and sufficing reason that the Kumar's body had been removed for cremation long before, and the exigencies of a second cremation did not arise until about the early hours of the morning

DEFENCE STORY OF FACE BEING UNCOVERED

I may perhaps now turn to the evidence coming from the "Step Aside" witnesses, almost with suspicious unanimity, that they all saw there the face uncovered,—whether they were men who were in a position to recognise it as the face of the second Kumar, because they had known or seen him before, or utter strangers who had never seen or been introduced to him in life The learned judge seems to think—showing by his attitude only his utmost fairness to the defendants—that it would be enough for the defendants' purpose, if the face was not covered up, but seen, even though it might not be proved to have been the face of the Kumar (*Vol 18, p 316, l 17*)

For the body to be covered up, face and all, after death, is neither an unusual practice among Hindus, nor to be regarded as a circumstance of suspicion by itself, and it would be a mistake to suppose that the plaintiff sought to draw any adverse inference from the mere circumstance that Dr Acharyya on his arrival at "Step Aside" saw a body sheeted over from head to foot The body might well have been that of the Kumar even though he saw it in that condition, but the tell-tale fact was that he was not permitted to uncover the corpse and examine it

As it occurs to me, the very fact that one would not normally expect a dead body to be kept lying in the house with the face exposed, specially when for some reason or other the cremation was delayed, might itself have been a circumstance which Satyendra and his confreres banked upon to ward off suspicion on the part of by-standers regarding the identity of the body A person coming to a Hindu house of death and seeing a corpse laid on a bed, fully covered over, ready to be taken away, was not likely to ask any questions about it

All that one of the defendants' witnesses, Satya Prosad Ghosal, D W 101, says is that "*immediately a person is pronounced dead, the body is not always covered from head to foot*" (Vol 14, p 296, ll 31-32), a fact which the plaintiff does not and is not concerned to deny

To my mind, the plaintiff's witnesses, either of the evening or of the morning cremation, who say that they saw the dead body covered, give only normal evidence. Thus, for instance —

P W 947, Jatindra Chandra Chakravarty

"I saw the body lying covered with a shawl" (Vol 10, p 419, l 32),

P W 968, Chandra Singh

"The body was covered with a white sheet" (Vol 11, p 86, l 7),

P W 603, Swami Oankarananda

"As I entered it, I saw a body, wholly covered, being brought out" (Vol 8, p 93, ll 24-25),

P W 823, Basanta Kumar Mukherjee

"Reaching there I saw the dead body wrapped in cloth and lying on a *khat* in the yard" (Vol 9, p 383, ll 31-32),

P W 967, Ram Sing Subha

"The body was wholly covered, head to foot, by a white cloth" (when he saw it in the evening) (Vol 11, p 66, ll 13-14), and again,

"The body (in the morning) was covered up entirely with a white cloth, and on the top of that was a shawl" (*ibid*, p 66, l 44—p 67, l 1),

P W 944, Bisweswar Mukherjee

"There I found the dead body lying on a *khatia* below. The body was covered. It was covered with a shawl or some thick stuff" (Vol 10, p 395, ll 8-9)

SUSPICIOUS UNIFORMITY IN EVIDENCE

On the other hand, as I have indicated, the way in which each of the defence witnesses, stranger or acquaintance, keeps on saying that he saw the face uncovered, does indeed appear very suspicious. One wonders in fact what should make these witnesses, almost without exception, remember this little detail, as if this was a matter of tremendous significance at the time which they were not expected to forget. Admittedly, there were no circumstances to excite any suspicion regarding the identity of the body which was about to be removed for cremation. These men were there, because they had been expressly summoned to assist at the funeral of the second Kumar of Bhowal quite naturally, therefore, they would take it that the body they saw at the house was that of the Kumar, and even if it was wrapped up from head to foot, they were surely not going to ask that the cloth should be taken off the face in order that they might have a chance of scrutinising the features beyond the possibility of mistake. Supposing, on the other hand, the face was already exposed for them to see, this would

by' no' means be such an extraordinary fact that they should remember it to the end of their lives

It will serve no useful purpose to give a catalogue of the witnesses who speak about seeing the face uncovered the evidence they give is obviously in such utter disregard of probabilities that one finds it difficult to attach any credence to it, and I cannot help the conclusion that it is tutored evidence I do not believe that all of them were present at "Step Aside" that morning, but if they were, what one would expect them to carry in their memory is only a general impression about a funeral which they believed to be that of the Kumar of Bhowal In trying to prove a little too much, they ended by proving nothing

In putting this evidence before the court the defendants evidently lost all sense of proportion they made no discrimination between those who had known the Kumar from before and those who had only casually chanced to see or know him for the first time at Darjeeling, the witnesses being all made to say with almost equal positiveness that the face they saw was that of the Kumar

It is not at all surprising that some of them made a pitiful exhibition of themselves in the witness box To pick out only a few typical cases Kanai Ram Mukherjee did not have a glimpse of the Kumar even at Darjeeling, but had seen him only once, and that about a year or a year and a half before his supposed death, and yet was in a position to assert with confidence 21 years later that the body he saw at "Step Aside" was that of the Kumar (*Vol 1, p 365, ll 1-12*) In cross-examination, however, he had to say "It is because others said that it was the dead body of the Kumar of Bhowal that I said that I have burnt the dead body of the Bhowal Kumar" (*ibid, p 374, ll 17-20*)

Mohendra Nath Banerjee had seen the Kumar only once or twice at the Mall (*Vol 1, p 324, ll 30-31 and p 333, ll 1-14*), and quite naturally, felt a bit hesitant in examination-in-chief, saying no more than that "the dead body was that of the second Kumar (as they said)" (*ibid, p 323, ll 37-38*), but in re-examination he was made to shake off all his diffidence "It was his dead body whom I saw sitting at the Mall His name was "Ranendra—Ramendra" (*ibid, p 343, ll 30-31*)

Nalindra Nath Ghose did not also have any "personal knowledge" of the Kumar, but had his first view of his face at the Mall where he saw him 4 or 5 times (*Vol 1, p 402, ll 10-11, p 412, ll 16-20, and p 417, ll 13-15*), but this was quite enough to make him recognise the face at "Step Aside" (*ibid, p 403, ll 10-11*), though he only stood on the road outside the gate, watching the body being brought down from inside (*ibid, p 413, ll 23-26 and l 30*)! The witness, it may be noted, was not a Brahmin, but he went, as he says, "as a mark of respect" (*ibid, p 402, l 27*), for his mess-mate Lal Behari Babu (of course dead) had given a general instruction at Cutchery Building that morning, "All of you ought to go He was a rich man You should go" (*ibid, p 413, ll 10-11*)

Durga Charan Pal, D W 57, similarly had not seen much of the Kumar at Darjeeling—might have seen him 4 or 5 times only, always in European attire (*Vol 13, p 416, ll 22-24 and p 149, l 37—p 150, l 10*), and though he also did not go inside the house but stood just near the gate, he still saw enough of the dead body to be able to say not only that the face was uncovered, but that the rest of the body was covered with a shirt and a lungi

(*ibid*, p 147, ll 2-3 and l 36—p 148, l 2) he noticed even a “reddish fair” tinge on the dead man’s face, the same as he had seen in the living Kumar! (*ibid*, p 151, ll 31-36)

Satya Prosad Ghosal, D W 101, had never seen the Kumar in life (Vol 14, p 287, l 21), but he was sure that the body was not covered as it lay on the bed in which it was brought down, and it was not the body of a *Pahari*, but of a Bengalee (*ibid*, p 287, ll 37-38 and p 288, ll 3-4). He was sure also that the body he saw, at “Step Aside” was the same as was carried to the cremation ground (*ibid*, p 289, ll 21-22). This is the witness who jointly with Sasī Bhūsan Banerjee (since deceased) gave an affidavit of cremation to Rāī Bahadur Hari Mohan Chandra for the Insurance Company, declaring that they had every reason to believe that the body they had cremated on the morning of the 9th May was that of the person whose life had been insured.

A FEW TYPICAL WITNESSES

One or two samples may also be given to show the quality of the witnesses the defendants put forward to prove their case, apparently believing in the mere efficacy of numbers,—a fact, however, which one would find it somewhat difficult to reconcile with counsel’s unconcealed contempt for “*corroboration’s crafty aid*” Take for instance —

Laksman Ram, D W 74 (Vol 13, pp 264-269), who had a grocer’s shop in Bhutia Bustee below “Step Aside”, and who had just spread out his wares one morning at about 8 A.M. on a *hat* day when he heard that the “Raja of Bhowal” was dead. He hurried at once to “Step Aside”, and getting inside the gate found a *khatha* there, but no corpse. Some 15 minutes later, however, the dead body was brought out and placed on the *khatha*, and it “looked like that of a veritable Raja”. The face was of course “uncovered”. The body was then taken out of the house, and he quietly returned to his shop, apparently satisfied that he had done his duty to the defendants in anticipation as a truth-loving witness! (*ibid*, p 264, ll 22-28). On his own admission the man was convicted and sent to jail for three months for giving false evidence, but subsequently acquitted by the High Court (*ibid*, p 267, ll 4-15 and p 268, ll 21-23), though he had begun by saying that the criminal case had ended in a compromise (*ibid*, p 266, ll 29-30). According to him, the body was brought out of one of the “rooms” on the ground floor (*ibid*, p 269, ll 23-24). The witness was a tenant under Wernicke, the owner of “Step Aside”, whose care-taker was Anup Lal Goswami *alias* Nera Gossain, D W 411 (Vol 17, pp 302-316).

Take, again, Kalu Satri, D W 75 (Vol 13, pp 270-281), another man under the influence of Anup Lal Goswami. He was chowkidar of “Step Aside” since 1921, but still lived in the servants’ quarters of a house just above it, called “Pekoe Tip”. He had been living here also in 1909 with his father who was then the chowkidar of this place (*ibid*, p 270, ll 10-25). From the top of a hill-path going up to his quarters he could see the dead body being brought out into the compound of “Step Aside” from inside the house in a *kapra* (cloth), and of course remembered that the face was uncovered at the moment (*ibid*, p 273, ll 21-29). The witness was asked in cross-examination if he was in jail, and he vehemently protested. “I was never in a jail. I never was. I was never imprisoned for theft. The police do not come to me and look me up” (*ibid*, p 275, ll 1-3). It turned out,

however, from a register of convictions produced by the plaintiff a few weeks later that the man was in jail at the time he is supposed to have seen the incidents about which he was giving evidence, undergoing a three-years' sentence of rigorous imprisonment with effect from August, 1907, to be followed by five-years' police surveillance (*Ex 345, Vol I, p 237*) He admits that he came to Dacca to depose after taking leave from Anup Lal Goswami (*Vol 13, p 275, l 5*), and this is also borne out by Anup Lal himself who could not deny that he knew that Kalu Satri had been in jail (*Vol 17, p 311, ll 21-27*) Anup Lal knew also the other witness Lakshman Ram, but of course denied that he had compelled him to give evidence (*ibid, p 311, ll 28-33*)

Anup Lal Goswami, by the way, had seen a funeral procession going past him one morning in 1909 in the bazar, scattering pice and rice as it went along, and heard it was that of a "rich man of Dacca" (*Vol 17, p 307, l 38—p 308, l 10*), but it is a pity he still desisted from bearing testimony to such an important fact in his examination-in-chief, merely stating, in reply to a specific question if he had heard of the death of the second Kumar at Darjeeling "I heard once a rich man had died at "Step Aside" " (*ibid, p 307, ll 17-18*) Thus happens to be also all the revealing information which he would have the court believe he imparted to Prasanna Deb Raikut, M.L.C., with whom he could not deny he had a conversation,—though, of course, denying the suggestion that he told this gentleman he had accompanied the funeral procession of the second Kumar on the night of the 8th May, but had to come away without cremating the body, because of rain and storm and because the body was thereafter missed (*ibid, p 307, ll 28-35*)

SHYAMADAS BANERJEE

Satyendra's cousin Shyamadas Banerjee, to whose evidence I have had frequent occasion to refer, may also be supposed fully to maintain the standard of defendants' witnesses. He joined the Bengal Secretariat in 1904 as an Assistant Accountant, and was officiating Accountant when, as he says, he "retired" in 1927 (*Vol I, p 266, ll 5-6 and 8-14*) Asked how much he got as pension, he said his "case as regards pension" was "not yet finally settled" (*ibid, p 266, ll 15-16*), and to a later question why he took pension prematurely, he started by saying "Because there was disagreement with me I took pension because I could not pull on well with the Secretary" (*ibid, p 274, ll 17-19*) A minute later he had to admit

"The order of Government is that 'I have been removed from this office' I have been removed on the ground that Government is not satisfied with my work. There was a proceeding against me. Government withdrew the same" (*ibid, ll 23-26*)

A still further question had to be put to elicit the information that the proceeding was "for defalcating the Government money", and that it was withdrawn on his paying this sum (*ibid, p 274, ll 29-30*) There was a discrepancy in the account for Rs 1,000/- or Rs 1,200/-, the amount falling short from the cash balance in hand, still, to a suggestion of defalcation he returned an emphatic No (*ibid, ll 32-37*) The moment a further suggestion was put to him that there was a talk of criminal prosecution which was only dropped on his imploring the authorities to accept the money from him and let him off with an order of dismissal, he bravely replied "This is

not a fact", but not before learned advocate for the defendants, Rai Bahadur S C Ghose, had intervened, demanding to know from the plaintiff's pleader on whose authority the latter had put the question (*ibid*, p 274, l 38—p 275, l 10) "What is the fact then?"—he was asked, and the question was repeated a number of times, but taking the cue from the Government Pleader who butted in with the remark that the answer had already been given (*ibid*, p 275, ll 11-14), the witness kept on reiterating with sickening emphasis that he had nothing to add to the statement he had already made (*ibid*, p 275, l 15—p 276, l 14) Such is the type of witnesses who are the main props of the defendants' story

Jagat Mohini Dasī, the town nurse from Victoria Hospital, who also figures prominently in this chapter of the case, need not suffer by comparison either, but she must be reserved for fuller treatment later

As for Dr Ashutosh Das Gupta, a witness abandoned by his own counsel, he stands a class apart, whose tergiversations in the box would put the most shameless perjurer to the blush

As I have indicated, I am not at all impressed by the defendants' evidence that the face was seen uncovered, and in my opinion, that evidence leaves the testimony of Dr Pran Krishna Acharyya wholly unshaken

It still remains, however, to consider the other facts which the defendants claim to have proved in order to establish that the body which was taken out in the morning procession was that of the second Kumar One is that the body was seen upstairs or seen being brought down to the ground floor, and the other is the presence of people like the maternal uncle, Suryya Narain Mukherjee, and the Government Pleader's wife, Kasiswari Devi, which, it is said, should *ipso facto* exclude the possibility of a substituted dead body being in the house Both these points have already been touched upon to some extent, but it would perhaps be useful to deal with them a little more fully

' MORE ABOUT BODY BEING UPSTAIRS

The inmates of "Step Aside" like Bibhabati Devi, Satyendra Nath Banerjee, Dr Ashutosh Das Gupta, Birendra Chandra Banerjee, Bepin Behari De and Anthony Morel, all undoubtedly say that the body lay upstairs the whole night Amongst outsiders, Jagat Mohini, Shyamadas Banerjee and R N Banerjee also speak to having seen the body on the first floor Kasiswari Devi, Suryya Narain Mukherjee and Dr Nibaran Sen are all dead, but they are stated to have gone upstairs as well and seen the body there, and there is some evidence that another person, also deceased, Anukul Chatterjee perhaps went there too

The witnesses are unanimous in saying that the body lay in the room where the second Kumar had died, which they identify as room No 2, being the second from the south or the Chowrasta-end of the house, and that the second Rani remained there the whole night, but there is at least one remarkable fact about which the evidence is not only strikingly lacking in corroboration, but even discrepant It is as regards the picture which Jagat Mohini draws of the Rani holding the dead body in her clasp all the time from midnight to morning, while she and her fellow nurse Mangli keep clinging on to the Rani,—a scene which ought surely not to escape the memory of those who profess to remember the happenings of that day

to the minutest detail. Strangely enough, however, there is not a word about it from the lips of Bibhabati herself, or from Satyendra or any of the other witnesses who say they were upstairs that night. Bibhabati does not even mention this devoted pair of her companions in woe (*Vol 12, p 204, ll 6-10*), while the name of Jagat Mohini fails to stir any reminiscences in the mind of Dr Ashutosh Das Gupta, a mine of memories as it is (*Vol 16, p 288, ll 36-39*). A direct contradiction of this idyllic tale comes in fact from the evidence of Shyamadas Banerjee, who, deposing unfortunately before Jagat Mohini, declares in unmistakable terms that he did not see any of the two nurses in the Kumar's room at all, but saw them in another room, probably on the ground floor (*Vol 1, p 269, ll 38-40*).

To my mind, this one great lie is sufficient to react on the whole of the evidence which the defendants have chosen to put forward in support of this part of their story. It is apparently little incidents like these, not perhaps considered important enough for the witnesses to concentrate upon, which really often turn out to be the touch-stone of a false case.

It is indeed difficult to believe these witnesses, not excepting those who are supposed to be "respectable" or "disinterested", as in fact I have already shown sufficiently in the course of my judgment so far, but will be made clearer still on a fuller examination of the evidence given by some of these persons.

JAGAT MOHINI THE TOWN NURSE

Take, for instance, Jagat Mohini (*Vol 1, pp 281-299*), on whom Mr Chaudhuri strongly relies as one of his most important witnesses.

She was the Town nurse from Victoria Hospital who admittedly came to attend the Kumar on the afternoon of his death. Her evidence is that the Kumar died at midnight and she was present at the time of death, and that after death she remained clasping the Ram and the Ram clasping the Kumar, till early next morning she was sent out to call people from almost all over Darjeeling for the cremation. As if this was not occupation enough, she was required to carry the sacred thread and Ganges water to the *sasan*, —the sacred thread, from "Step Aside" where fortunately Kasiswari Devi was able to supply it, and the Ganges water, from the Burdwan Rajbari, whither she was, therefore, obliged to go, in a dandy, as she once says, or in a rickshaw, as she says again. She was present at the cremation till the very end, and did not in fact leave the place before washing the pyre in true orthodox fashion with pitcherfuls of water, like every other mourner present there. She thus qualified herself fully to be an omnibus witness from "Step Aside" to *sasan*, the sacred thread and Ganges water serving not only to establish the connecting link between the two, but also to instal Kasiswari Devi at "Step Aside" where her presence that morning was bound to be very useful.

FROM "DASI" TO DEVI"

The witness in my opinion convicts herself out of her own mouth of infamous conduct which discredits the whole of her evidence. She is not a Brahmin, but still tries to pose as one. On her own account she is a "Dasi", and has been a "Dasi" all her life to the outside world, this being

JAGAT MOHINI'S EVIDENCE

a distinctive appellation of a Bengalee woman who is not a Brahmin. Her midwife's certificate from Dacca Medical School describes her as Jagat Mohini Dasi (*ibid*, p 286, ll 6-9 and p 298, ll 38-39) she takes up service at Victoria Hospital, Darjeeling, in the same name, and signs as "Dasi" in the books there (*ibid*, p 286, ll 16-18, 29-30 and 37-38) and when on retiring from Darjeeling she sets up practice at Baranagar, Midwife and Nurse" (*ibid*, p 287, ll 13-15). Even her present deposition in court she signs as Dasi name on a sign-board as "Jagat Mohini Dasi, Midwife and Nurse" (*ibid*, p 287, p 299, l 11), and if the plaintiff's suggestion to have given her believed, that is also the name in which she appears to have given her statement to Lethbridge (Vol 2, p 195, ll 24-25). And yet when this woman comes to give her deposition, she becomes a "Devi" from a "Dasi", and unblushingly makes herself out as a Brahmin widow, giving her husband's name as Rajam Kanta Chakravarty (Vol 1, p 281, ll 7 and 12-13). But no Brahmin woman, as the learned judge very rightly points out, would ever call herself "Dasi" (Vol 18, p 389, ll 25-26)—not even, I may add, to hide the fact of having taken to a nurse's life, on the pretext, as the witness seems to suggest, that it might not shed lustre on the family name (Vol 1, p 286, ll 6-7).

It is impossible to believe Jagat Mohini was a Brahmin, or even a Hindu curiously enough, she could not state the *gotra* either of her husband, or of her father and maternal uncle (*ibid*, p 298, ll 3-4), the plea she gives for her ignorance that she never performed any religious rites (*ibid*, p 298, ll 4-5) being demonstrably false on her own showing, as she could not deny that she had solemnised the *sradh* of her husband at Shologhar and of her mother at Baranagar (*ibid*, p 285, ll 11-12 and p 298 ll 6-7). She went the length of saying she had "taken *mantra*", or been initiated (*ibid*, p 298, l 12), and even presumed to recite the *mantra* (*ibid*, p 288, ll 21-26), though this is strictly forbidden to a Hindu, and though in that case she should have known at least her own *gotra*.

If she was a Hindu widow, she certainly did not, as she admits herself, live the life of one since her widowhood, she observed neither the *nyunc*-tions regarding her wear, nor the restrictions regarding her food. She would put on ornaments and cloths with coloured borders (*ibid*, p 285, ll 33-34), and also be eating fish and meat (*ibid*, p 284, ll 8-11), a transgression which would be shockingly repugnant to any widow in an orthodox Hindu family.

One cannot help feeling that Susila Sundari Devi, P W 1016, spoke the truth when she said that Jagat Mohini did not appear from her dress and manner to be a Hindu woman (Vol 11, p 518, ll 13-14). This lady knew one Rajam Chakravarty at Shologhar who was her father's family priest, and was startled at the suggestion that Jagat Mohini was his wife (*ibid*, p 518, ll 15-20 and 28-29), and it will be seen, to the same effect was also the evidence of her brother Jatindra Chandra Chakravarty, P W 947 (Vol 10, p 421, ll 5-14), Shologhar being the home of both the witnesses.

Jagat Mohini knew herself that at Darjeeling she was not treated as an orthodox Brahmin widow she would not be called to any social function (Vol 1, p 287, ll 4-5), and if she took her food at the house of Mahendra Nath Banerjee with the ladies of the family, it was because, as she says, it was the house of an England-returned person (*ibid*, p 286, ll 38-40). To me it is perfectly obvious that this attempt, disingenuous as it was, to pass off the witness as a Brahmin had a definite object behind it, namely,

to fit her into the role she was intended to play in the story of the sacred thread and the Ganges water, a story which was a very necessary part of the defendants' case, and was designed to serve the double purpose of ensuring the performance of full orthodox rites at the *sasan* to the minutest detail enjoined by the *shashtras*, and of securing the presence of Kasiswari Devi at "Step Aside", which it was rightly felt, would at once dissipate all suspicion regarding a substituted dead body

SACRED THREAD AND GANGES WATER

The suggestion was no doubt strongly repudiated by Mr Chaudhuri, who pointed out, quite correctly, that Ganges water could be carried by anyone, Brahmin or non-Brahmin, and called attention to some evidence which the defendants had actually led on the point through D W 402, Sarada Prosad Bhattacharjee (*Vol 17, p 212, ll 22-30*), to show that it was not defiled by the touch of even such a low-caste Hindu as a *Hari* or a *Muchu* or a *Bowli*. The fact remains, however, that the defendants were very much concerned to put forward Jagat Mohini as a Brahmin, though evidently they were not prepared for the revelations which came to light in the course of her cross-examination, and it is further not shown that a sacred thread, like Ganges water, could be carried by a non-Brahmin

It is curious, by the way, that Sarada Prosad Bhattacharjee made Jagat Mohini a Brahmin first, and then merely dressed her in the attire of one (*Vol 17, p 212, ll 18-21*)

One need not discard the story of the Ganges water altogether probably the sacred water was procured from the Burdwan Rajbari on purpose, and the fact must have been duly given out at Jadedpur to convince the ladies there, which accounts for Ram Satyabhama writing to the Maharajadhiraj of Burdwan in 1917 "it is said that you arranged for the *tulsi* leaves and the Ganges water" (*Ex Z (33), Vol II, p 176, ll 3-4*), a fact which Rai Bahadur Sasanka Coomar Ghose had collected at quite an early stage during his first visit to Darjeeling after the plaintiff's "Atma-Parichay". One finds it difficult, however, to believe Sarada Prosad Bhattacharjee when he says that the person who called at "Rose Bank" for the Ganges water was Jagat Mohini, the Town Nurse (*Vol 17, p 209, ll 33-34*). This bit of evidence was nothing but an attempt at corroboration which the Town Nurse certainly needed, and the defendants themselves felt she did. According to him, Jagat Mohini sent word to the Maharani, and the Maharani sent word to the *pujan* at the *thakurbari* to deliver the Ganges water (*ibid, p 212, ll 37-38*), but as the witness would not see who was being given the water, unless he himself went to the *pujan* (*ibid, p 215, ll 7-8*), he must not only bring the latter to his office to give him the formal permission, as if the Maharani's direction was not enough, but accompany him to the rickshaw and see him actually pouring out the water into a brass pot which Jagat Mohini carried (*ibid, p 212, l 38— p 213, l 18*). This giving of the water was not of course "a great event in his life" (*ibid, p 215, ll 11-12*), still he was able to give from memory 27 years later the very quantity of water which was delivered on the occasion (*ibid, p 213, ll 22-23*)

It is perhaps worth while calling attention to the fact that on many points Jagat Mohini's evidence is not only not consistent with, but contradicted by, that of other witnesses of the defendants. Thus, as regards the Ganges water, she says that the body was bathed with the water she had brought (*Vol I,*

PRESENCE AT SASAN A MYTH

§ 283, ¶ 1-4), but Shyamadas Banerjee, who was examined before her, has a different story to tell, namely, that the body was bathed with water obtained from the *jhora* (*ibid*, § 257, ¶ 31), and this is also the version of Bijoy Krishna Mukherjee (*ibid*, § 320, ¶ 26-27), and of R. N. Banerjee as well (Vol 3, § 108, ¶ 27-28 and 30).

Bejoy Krishna Mukherjee further says that perhaps Balu Babu (did he mean Balu?) procured the Ganges water and *tuls* leaves as he came (Vol 1, § 320, ¶ 27-28), adding

"While going on with the procession on the road, Balu Babu said that the Ganges water and the earth of the Ganges and *tuls* leaves would be required. Saying this either he procured it himself or with the help of others" (*ibid*, ¶ 30-33).

According to this witness Kasiswari Devi is nowhere in the picture. Mohendra Nath Banerjee's idea is that Jagat Mohini took *tuls* leaves and Ganges water from the house of the Government Pleader (Vol 1, § 325, ¶ 2-4).

GOING TO SASAN A MYTH

Then, as regards Jagat Mohini's supposed presence at the cremation ground, Bijoy Krishna Mukherjee's evidence is that there was no female there (Vol 1, § 320, ¶ 25-26), while Mohendra Nath Banerjee saw her at the *sasan* only for an hour or for an hour and a half (*ibid*, § 341, ¶ 15-22), though according to her own statement she was present right up to the end of the *sasan* (Vol 1, § 283, ¶ 11-12), performing the very last act of pouring water over the pyre, which it was of course necessary for her to do in order to prove herself a true-born Hindu (*ibid*, § 292, ¶ 20-21).

I have no doubt in my mind that her going to the *sasan* is a myth, pure and simple, though besides Mohendra Nath Banerjee, there are a few other witnesses who also speak to having seen her there. Thus, Shyamadas Banerjee says that perhaps she came in a rickshaw (Vol 1, § 260, ¶ 3), while Kalipada Mahtia says she reached there with Ganges water, probably within an hour of the arrival of the cremation party (*ibid*, § 349, ¶ 16-17 and § 361, ¶ 6-8). Nalendra Nath Ghose says she went, but he does not remember if she accompanied the procession or arrived later, nor if she returned earlier or with the rest of the party (*ibid*, § 404, ¶ 24-26 and § 410, ¶ 26-36), and last but not least, R. N. Banerjee volunteers the information that he remembers to have seen her some time towards the end of the cremation (Vol 3, § 122, ¶ 31-33), having had a previous "glimpse" of this ubiquitous phantom "behind an open doorway" at "Step Aside" (*ibid*, § 120, ¶ 40-41). But if I am not mistaken, she is not mentioned by any of the other cremation ground witnesses, such as Rajendra Nath Sait, Tinkari Mukherjee, Kanai Ram Mukherjee, Kshetra Mohan Bhattacharjee, Satya Prosad Ghosal, Nanda Gopal Gargari and Haran Chandra Chakrabarti.

Satyendra, as usual, is very guarded in his reference to this witness, whose statement, by the way, he admits Lethbridge had recorded at his request (Vol 16, § 460, ¶ 27-28). He merely knew that Jagat Mohini had deposed that she had carried the Ganges water and sacred thread to the cremation ground (*ibid*, § 460, ¶ 38-39), and would not vouch for this last fact from personal knowledge.

The description she gives of the dimensions of the small "ghar" at the new *sasan* shows that she could not have been there (*Vol 1, p 292, ll 2-9*) Plaintiff's witness Ram Sing Subba, P W 967, gave true evidence when he said that there was no woman at the *sasan* during the time the body was cremated (*Vol 11, p 67, ll 24-25*), and so also did Swami Oankarananda P W 603, who said he had not seen Jagat Mohini Dasi or any woman at the *sasan* at the time (*Vol 8, p 94, ll 39-40*), as well as Basanta Kumar Mukherjee, P W 823, who too did not see her or any other woman there (*Vol 9, p 384, ll 41-42*)

In her anxiety to make her evidence as circumstantial as she could, this woman thought it right to add a small, but realistic detail that as soon as she carried the news of the Kumar's death to the Government Pleader's house, his eldest son Balen started calling up people on the telephone (*Vol 1, p 282, ll 11-13 and p 290, ll 18-19*), but neither she nor the defendants could foresee that this court would obtain from the Post Master General a list of the telephonic connections at Darjeeling at the time and find out that there was none at "Balen Villa" (see the Post Master General's letter, marked by consent of parties, *Ex P M G B 1*)

Jagat Mohini, it will be seen, did not bring R N Banerjee to "Step "Aside" on the morning of the 9th May, but brought instead his father the Government Pleader, M N Banerjee, as well as the latter's wife Kasiswari Devi and elder son Balen (*Vol 1, p 282, ll 10-11*) Mr Chaudhuri would probably say, as "craftiness" would, of course, be a thing unknown to a defence witness, that Jagat Mohini was merely lending corroboration's *craftless* aid to Shyamadas Banerjee who had given precisely similar evidence three days before (*Vol 1, p 257, ll 3-4*) Kalipada Maitra followed two weeks later with what "aid" he could bring, but could not make it sufficiently strong, stating merely that so far as he could remember, M N Banerjee was there (*Vol 1, p 350, l 15*) Gita Devi, however, who came to be examined some time later, cruelly let down all the three by keeping her ailing father-in-law at home, as "he was then very ill" (*Vol 3, p 164, ll 2-3*)

A PICTURESQUE FICTION

It is not necessary to refer any further to Jagat Mohini's picturesque fiction of the scene in the Rani's room as she lay there clasping the dead body and being clasped in her turn by the two nurses, nor to her deliberate suppression of the Rani's fits, or of Dr B B Sarkar's evening visit

Her story of Kasiswari's presence at "Step Aside" on the 9th May morning, as will be seen later, is equally a fiction, and quite in keeping with her true self, she introduces into the Rani's room at night two fictitious widows whom she describes as ladies "belonging to gentlemen's family" (*Vol 1, p 293, ll 13-15*), about whom no other witness speaks

It is not surprising that she completes her tale of falsehood by her denial that she knew who the Kumar's brother-in-law was (*ibid, p 288, ll 10-13*), or had even heard the name of Satyendra Nath Banerjee (*ibid, p 289, ll 32-33*) She was asked if Lethbridge had recorded her statement at Satyendra's request, and she said "I do not know all those things", but, as already stated, the fact was admitted by Satyendra himself (*Vol 16, p 460, ll 27-28*) So far as I can find, there is no evidence on record as to how Satyendra or anybody else on behalf of the defendants was able to trace out the whereabouts of Jagat Mohini at the time

R N BANERJEE ALIAS BEBUL

Another witness, also a pillar of Mr Chaudhuri's case, may be now considered,—R N (Rabindra Nath) Banerjee (*Vol 3, pp 106-124*), youngest son of the late Mahendra Nath Banerjee, the Government Pleader of Darjeeling, who has been often referred to above. His nickname is Bebul. He and his eldest brother Balen (since deceased) are said to have come over to "Step Aside" on the 9th May morning along with their mother Kasiswari Devi, and made arrangements about the cremation. Both brothers are supposed to have carried the dead body from there to the *sasan* and seen the cremation through. He was then a young lad of 17.

The outstanding facts which it is sought to establish through Rabin Banerjee or Bebul are the body remaining upstairs and the presence of Kasiswari Devi at "Step Aside", but the learned judge has refused to believe his evidence and holds that he was not there at all that morning (*Vol 18, p 384, ll 42-43*).

INEXPLICABLY OVERLOOKED AT EARLIER STAGES

There are a number of circumstances which combine to throw suspicion on the *bona-fides* of this witness, and may be briefly adverted to.

- (1) R N Banerjee is not mentioned in Satyendra's diary, though it refers to Balen by name under date 9th May "M N Banerjee's son Balen, Phatick, Shyamadas arrived" (*Ex 399 (2), Vol I, p 307, ll 3-4*).

This is undoubtedly a most significant omission, and Satyendra has no explanation to offer (*Vol 16, p 502, ll 13-17*). His pretended forgetfulness of the name of this younger son of M N Banerjee, both in examination-in-chief and in cross-examination (*ibid*, *p 429, ll 30-31 and p 501, ll 38-39*), is a poor attempt to put on an air of truthfulness which deceives nobody.

- (2) R N Banerjee is not mentioned by any of the earlier defence witnesses examined on commission before him, though some of them mention Balen or Kasiswari, and two or three, as shown already, mention even the father M N Banerjee.

After his evidence, "corroboration" followed, of course, with a free flow,—but perhaps with no "crafty" intent, for the evidence came from Mr Chaudhuri's side! (See among others, D W 66, Narendra Nath Mukherjee, *Vol 13, p 191, ll 7-9, and p 194, ll 34-35*, Surendra Mohan Chanda, D W 69, *Vol 13, p 211, l 30 and p 217, ll 36-38*, and D W 101, Satya Prosad Ghosal, *Vol 14, p 289, ll 28-29 and p 297, ll 1-3*).

Seeing, however, the active part which is assigned to Rabin both at "Step Aside" and at the *sasan*, it does seem remarkable that the commission witnesses, one and all, with their wonderful powers of observation matched only by their extraordinary memory for details, should still have missed him, or have forgotten to mention his name, specially as like his brother, Rabin was carrying the dead body in "trousers and coat", as he himself says (*Vol 3, p 120, ll 25-26*), and as say also the corroborating witnesses (D W 69, *Vol 13, p 218, ll 25-27 and p 222, ll 3-7*, and D W 101, *Vol 14, p 294, ll 11-16, and p 297, ll 3-4*),—a sight which must have been quite an unusual one at a Hindu cremation even at Darjeeling. There is evidence of men going to a cremation there with shoes on and in warm clothes, as

Swami Oankarananda, P W 613, for instance, says (*Vol 8, p 98, ll 33-37*), but none about a *sasan-bandhu* being in "*sahebi dress*"

It will be seen that some of the commission witnesses were specifically asked who carried the corpse or laid it on the pyre, and yet none of them mentioned Rabin Banerjee or any body in European clothes. Mahendra Nath Banerjee in fact stated that those who brought out the dead body from inside the house to the verandah were "their own men" (*Vol 1, p 327, ll 26-27*), which would exclude Rabin, and is contrary to the later evidence of the defendants following that of Rabin.

It is impossible to accept Mr Chaudhuri's explanation that Rabin Banerjee was overlooked by the defendants at the early stage through inadvertence: that is a failing of which counsel has no right to accuse his clients, who, it is not shown, would miss a single detail they could possibly get hold of.

- (3) R. N. Banerjee is not mentioned or thought of in the course of the Lindsay enquiry, or even at a later stage until towards the end of 1932, when he is approached for the first time by the Collector of Dacca through the Collector of Mirzapur (*Ex Z (136), Vol II, p 270*), Mirzapur being a station in the United Provinces below Allahabad where Rabin was staying at the time under medical advice, as he says (*Vol 3, p 106, ll 22-28*).

There is no explanation for this passing over of such a useful witness before 1932.

BAR LIBRARY DISCUSSION

Rabin's own evidence is that in 1921 or 1922, after the appearance of the plaintiff, he was discussing the matter openly in the Bar Library of the Calcutta High Court, and vehemently protesting against the rumour of the second Kumar not having been cremated at Darjeeling as a "deliberate concoction" (*Vol 3, p 112, ll 28-38 and p 113, ll 7-13*). In the Bar Library there was at the time another member of the Bar whom he knew and would see off and on (*ibid, p 113, ll 4-6*), and with whom he was on "the usual friendly terms" (*ibid, p 117, ll 20-21*), Bon Behary Das, the "barrister friend" of Satyendranath Banerjee, who, it will be remembered, went up to Darjeeling with the latter in May, 1921, Satyendra having taken him along, as he says, only "out of love and friendship", and Bon Behary Das' brother-in-law N. K. Roy being appointed "quite accidentally" to record statements of witnesses (*Vol 16, p 491, ll 28-32*). And yet one wonders why after this open discussion the "friend" should have done such an "unfriendly" act as not to have apprised Satyendra at the time of the potentialities of this evidence.

Bon Behary Das is not a witness in the case, but as I read Rabin's cross-examination, there was a clear suggestion that he was present at the discussion: the witness, it is true, did not name him, merely stating that there were at the time other members of the Bar present (*Vol 3, p 113, ll 4-13*), but the point was not cleared up in re-examination, as I think it might have been.

According to R. N. Banerjee, he had yet another discussion of this case, probably in 1924 or 1925, this time in a motor car on his way back from

a Calcutta Club Dinner, with K C De, Member of the Board of Revenue (Vol 3, p 113, ll 20-38) The fact still remains that though K C De struck such a valuable witness, he kept supremely indifferent K C De admits that he was in the Board of Revenue from 1923 to 1928 with short gaps, and as the Court of Wards, was interested in the case (Vol 13, p 106, ll 5-7) It was he in fact who disposed of the plaintiff's memorial to the Board of the 8th December, 1926, Ex J (Vol III, pp 92-120), by his order, dated the 30th March, 1927 (Ex 471, *ibid*, pp 121-123), and as he himself says, the plaintiff and his pleader had an interview with him before the memorial (Vol 13, p 118, ll 30-31), the memorial according to him being the result of the interview (*ibid*, p 121, ll 8-9) It is idle to pretend, therefore, that at the date of Rabin's supposed discussion with K C De, the latter was not sufficiently interested in the matter to have procured a statement from him

If Mr Chandhuri's case is true, there could possibly be no justification for having overlooked R N Banerjee during the Landsay enquiry In August, 1921, Landsay had received Dr Pran Krishna Acharyya's answers to his questionnaire (Ex 2 (334), Vol II, p 260), and whether or not, as Dr Acharyya now says, he made a mistake (Vol 1, p 198, ll 37-39), there was his definite statement in reply to Q 8 "I saw sons (in the plural) of Mr M N Banerjee, Government Pleader, making arrangements for cremation" Balen Banerjee had no doubt died in 1918 (Vol 3, p 107, l 9), but what attempt, if any, was made to get hold of the younger son? Not only is there no explanation forthcoming from the defendants, but the fact that they did make no enquiries about R N Banerjee at that stage only shows to my mind that they themselves must have understood that Dr Acharyya had unwittingly betrayed himself into an error

PRESENCE AT CREMATION NOT AT ALL A FACT

I am thoroughly convinced that R N Banerjee was neither at "Step Aside" nor at the cremation ground that morning, as he now so airily declares with circumstantial details, and I fully accept the trial judge's conclusion on the point, which was in fact the plaintiff's case as put to the witness himself at the time of his examination

"Q—Would it be incorrect to say, Mr Banerjee, that you had never been to "Step Aside" or the cremation ground, and did not attend the cremation as stated by you?

A—It would not only be incorrect, but a deliberate falsehood" (Vol 3, p 123, ll 27-30)

The denial was very emphatic, but it so happens that the young man was actually at Kurseong that day, attending the Kakina feast! Mr Chandhuri points out, quite correctly, that there is not a word about the Kakina *sraddh* in the cross-examination, and this might perhaps be a matter for legitimate comment, were it not for the fact that Rabin's trip to Kurseong came to light quite by accident much later on, and that as soon as it did, the plaintiff lost no time in bringing it before the court The circumstances in which this information was revealed are fully set out in the evidence of P W 838, Jnanendra Nath Banerjee, who had in fact to be recalled two days after his examination was over to prove this fact (Vol 9, p 430, ll 7-16)

ATTENDING KAKINA SRADH INSTEAD AT KURSEONG

The story this witness gives seems to me perfectly natural and has the ring of truth about it. He had given a statement to the plaintiff's lawyer Arabinda Guha before he came to depose. He had been asked about the Kakina sradh then, and given the information which he stated in his evidence that he had gone to Kurseong from Darjeeling with a number of persons to attend the sradh (*ibid*, p 426, ll 19-20 and p 427, ll 20-21). He had not been asked, and had, therefore, not stated at the time who had accompanied him (*ibid*, p 430, l 8 and p 431, ll 14-17). In the afternoon of the day on which he had given his deposition he was sitting at the Dak Bungalow with Arabinda Guha and one Chuni Babu, when the conversation drifted to Darjeeling and to "Mahendra Babu and his sons", he casually mentioned "Bebul's" visit to Kurseong. He was then informed that Bebul had given evidence about having cremated the second Kinnar. The witness maintained that was impossible, whereupon Arabinda Guha asked if he would care to depose, and he agreed (*ibid*, p 430, ll 27-31). He was accordingly recalled, and the further evidence he then gave remained wholly unshaken in cross-examination.

Mr Chaudhuri asked the court to believe that the Kakina sradh being a fact, this was got hold of by the plaintiff at a late stage for the purpose of sending away R. N. Banerjee out of Darjeeling on the day of the cremation, but with due respect, this seems to me to be a fantastic suggestion. If Mr Chaudhuri's clients could not ferret out R. N. Banerjee until the end of 1932, though on their own case they must have known all about his presence at the cremation right from the beginning, the plaintiff to my mind can be held very little to blame for not having been able to discover at the earliest stage a fact which was not within his special knowledge. The plaintiff should perhaps feel grateful that it was not suggested that he had manufactured the Kakina sradh itself for the purposes of his suit!

The Kakina sradh was in fact put to the very first witness of the defendants, Shyamadas Banerjee (*Vol 1*, p 271, l 37—p 272, l 6), and to several others who followed, such as Jagat Mohan (*Vol 1*, p 289, ll 38-40), Rajendra Nath Sett (*Vol 1*, p 303, ll 14-18), Mohendra Nath Banerjee (*Vol 1*, p 326, ll 16-20), and Haran Chandra Chakladar (*Vol 1*, p 386, ll 11-13). Of these, Rajendra Nath Sett only heard that many persons had gone to attend the invitation; the others professed not to know anything about it, so that it was useless to ask any of these witnesses for names. Fakir Chandra Roy also stated that many people from Darjeeling had gone to Kurseong on the occasion, but gave no names of any such persons (*Vol 3*, p 8, ll 13-16).

On the plaintiff's side, the Kakina sradh was first mentioned by Surendra Chandra Roy Chowdhuri, but he was not in a position to state from personal knowledge who attended on the 9th May when the feast was held, he himself having come away to Darjeeling on the day following the actual ceremony which had taken place five days earlier (*Vol 2*, p 469, ll 20-28). As to R. N. Banerjee's presence at Kurseong on the day of the feast, Jnanendra Nath Banerjee, as already stated, was the first to speak about it, and after him followed several other witnesses to prove the fact, such as Ranjit Shingh, P.W. 940 (*Vol 10*, p 380, ll 20-33), Shaula Shekhar Chatterjee, P.W. 943 (*Vol 10*, p 391, ll 30-35), Bisweswar Mukherjee, P.W. 944 (*Vol 10*, p 395, ll 33-37 and p 398, ll 32-33) and Sashi Mohan Das, P.W. 969 (*Vol 11*, p 96, ll 22-37 and p 100, ll 22-23), of whom the last two were residents of Kurseong.

at the time, and Shaila Shekhar Chatterjee was son-in-law of R N Banerjee's own uncle (father's brother)

A criticism which Mr Chaudhuri advanced,—for what purpose, it is difficult to see,—was that these witnesses of the Kakina feast mentioned each other only, and not any body else. This is, however, not a fact. Besides R N Banerjee and the witnesses themselves, there were many others in the Kurseong party whose names they did give, as for example, Amrita Lal Ghosh, Satis Ghosh, Suren De, Siddheswar De, Radha Binod Chatterjee, Nagen Bose, and Jamini Mukherjee, mentioned by Jnanendra Nath Banerjee himself (*Vol 9, p 429, ll 17-37*), as also one "Kiron Babu" mentioned by Shaila Shekhar Chatterjee (*Vol 10, p 391, l 36*). As for this "Kiron Babu", it is necessary to add that he cannot be Kiron Chandra Mustafi, P W 941, as Mr Chaudhuri sought to make out in order to contradict the witness who named him, Kiron Chandra Mustafi's own evidence being that he was taken ill on his return from the night cremation and suffered from fever for 5 or 6 days (*Vol 10, p 384, ll 12-14*).

Nor is there anything in Mr Chaudhuri's point that as Bisweswar Mukherjee said that Bebul was the leader of the party that went to Kurseong (*Vol 10, p 398, ll 32-33*), his presence there must have been a notorious fact, and that Bebul should, therefore, have been cross-examined about it. Such cross-examination, it may be taken for granted, would have elicited a straight denial, but apart from this, it is quite clear that the plaintiff did not make, nor was he called upon to make, any enquiries regarding the matter until after Bebul had been put up to assert that he had played a not inconspicuous part at the morning cremation.

AN OVER-CLEVER WITNESS

There are many other reasons appearing in R N Banerjee's evidence itself, which make it difficult to accept it as that of a truthful witness, but nothing was wanting on his part to give it the appearance of truth, though he probably over-reached himself in the attempt.

Thus, for instance, he was asked who carried the dead body, and prefacing his answer as he did with the remark, "it is difficult to remember after such a lapse of time", he proceeded to give two names, besides his own and his brother "Balén Babu's",—those of Siddheswar De, the Registration Head Clerk, and Sashu Banerjee of the Deputy Commissioner's office, as among the local people who helped to carry the body. There were many others, but they were not local people and he was not acquainted with them. He could recollect, however, that "somebody connected with the Maharaja of Burdwan or his office" also went (*Vol 3, p 108, ll 1-8*).

REFERENCE TO SIDDHESWAR DE

It is doing no injustice to this clever witness to suggest that there was meaning and purpose in his remembering these two particular names among so many others. Siddheswar De and Sashu Banerjee were persons who had left documentary evidence to prove their presence at the cremation by swearing insurance "affidavits" (*Ex 29, Vol I, p 182 and Ex 2 (202), ibid, p 183*), and it must have been supposed that there was no surer means of producing confidence in the strength and accuracy of Rabin's recollection than for him to be able to recall two such names, as though by a genuine

effort of memory. The casual mention, but without the name, of somebody from the Burdwan Raj office was only another conscious attempt to give an unconscious touch of reality to the evidence.

It so happens, however, that Siddheswar De never attended the cremation, and the defendants themselves found it necessary to drop his presence, suppressing his affidavit as long as they could till denial was no longer possible when the plaintiff tendered the document in court on the 20th April, 1934 (*Vol 1, p 182, ll 32-37*). The affidavit or certificate, it will be remembered, had been procured by the defendants through the good offices of Rai Bahadur Hari Mohan Chandra, but through some mischance, in describing the personal appearance of the deceased, it made the stature "tall" and the body "stout built", a description which would at once tell off the body from that of the second Kumar, whose measurements only 4 years ago as given in the insurance proposal (*Ex 230, Vol 1, p 175, Item 7*) were—Height—5 ft 5 in (without shoes), Chest—in inspiration 35½ in, in expiration 33 in, and Abdomen—30 in. Siddheswar De is dead, and it is manifestly impossible for the plaintiff to explain how the defendants came to burden themselves with such an affidavit. He can only point to certain facts and leave them to speak for themselves. One is that this affidavit apparently necessitated a fresh certificate of "average stature" and "strong build" from Rai Bahadur Kali Prasanna Vidyasagar, a man who had really known the second Kumar from his very birth (*Ex 269, Vol 1, p 188*), this again being a document tendered by the plaintiff, though like the other affidavit, it had been called for by the defendants (*Vol 18, p 184, ll 28-43*). A further fact disclosed by Mr Chaudhuri himself, though only to account for what according to him was a wrong description in the affidavit,—Siddheswar De's own statement to the Board of Revenue, as counsel read it out to us from the copy sent to the trial court by the Board, which showed that he was on his way to Kurseong on the day of the morning cremation and saw the procession from a distance. It is also a fact that none of the defendants' witnesses of the 9th May before R. N. Banerjee, nor, so far as I can see, any after him, mention the name of Siddheswar De as among those whom they saw at "Step Aside" or at the *sasan*,—DW 101, Satya Prasad Ghosal merely stating in examination-in-chief that he knew the man (*Vol 14, p 291, ll 1-2*). R. N. Banerjee, no doubt to make himself as emphatic as he could, actually took Siddheswar upstairs, a perfect stranger as he was, even before he and his brother Balen got there (*Vol 3, p 120, ll 37-38*).

Satyendranath Banerjee admits having sent Siddheswar's affidavit to the Insurance Company, but he neither knew the man, nor made any enquiries about him, nor did he know if his statement to the Board of Revenue was that he had seen the funeral procession on his way to Kurseong (*Vol 16, p 541, ll 21-26*). A bit of edifying cross-examination which followed may perhaps be quoted here. Satyendra would not call the second Kumar a short man, but only say, not as tall as he himself was.

Q—Would you call him a tall man?

A—*Rather tall* I would say, though judging by my height I would not. I would call him a man of medium height.

Q—The body that you carried on the morning of the 9th was that of a tall man?

A—*You may call Kumar that*. It was Kumar's body. I would call him, judging by me, a man of medium height. When a

Bengalee ordinarily talks about a tall man, I have a notion of what he means (Then says) That would depend upon the man "

He no doubt protested that he was not indulging in these subtleties because Siddheswar had described the dead body as that of a "tall" man (*ibid*, p 541, ll 27-39)

There can thus be no doubt that on the defendants' own showing, the affidavit notwithstanding, Siddheswar De's presence at "Step Aside" or at the cremation ground on the 9th May was no more a fact than that of his enterprising sponsor Plaintiff's witness Jnanendra Nath Banerjee spoke the truth when he said that Siddheswar was one of the batch who went that day to the Kakna feast. If, by the way, the further statement of this witness can be accepted, on which there was no cross-examination, that Siddheswar went subsequently to jail for embezzlement (*Vol 9, p 429, ll 25-27*), it affords yet another illustration of the defendants' characteristic instinct in selecting their tools

Three or four months before he gave his deposition, R N Banerjee had supplied a statement to the Collector of Murzapur in the form of answers to a set of interrogatories (*Vol 3, p 114, ll 5-7*), which was produced by the defendants at the request of the plaintiff's pleader and marked as an exhibit (*Ex 288, Vol II, pp 272-274*). In Q 17 (not printed) he was categorically asked

"Q—Did you carry the dead body?

Who else did (any name that you can remember)?

Did the hulkman carry the said dead body?"

The answer was

"A—I believe so, and also my brother I do not remember the others
I do not think that any hulkman carried the said body "

This was said on the 8th December, 1932, and he gave his evidence on the 28th March, 1933. What happened between these dates to produce a regurgitation of memory?

TALK WITH "BROTHER BHUPEN"

Bebul did not remember even the name of Satyendranath Banerjee and could not connect it with anybody he knew (*Vol 3, p 113, ll 2-3*) probably he had never seen the Kumar's *saka!* (*ibid, p 114, ll 12-13*). But whether this was a fact or not, we have it from the witness himself that he came down to Calcutta after receiving the interrogatories, and had a talk with his "brother Bhupen" (*ibid, p 114, ll 5-11 and p 115, ll 14-15*).—Bhupen, or to call him by his full name, Rai Bahadur Bhupendra Nath Banerjee, being then Deputy Commissioner of Police, South District, Calcutta (*ibid, p 107, ll 10-11*), and a person who evidently knew a good deal about the case. It was he who, according to Gita Devi, his wife, got this lady to give evidence herself for the defendants, though this made her very angry with him, and as she says, had actually taken down her statement and typed it out at Darjeeling in the month of October preceding, telling her that "he had some use for it" (*Vol 3, p 169, ll 8-10, 13-17, 19-20 and 21-23 and p 170, ll 23-25*)

In his cross-examination R N Banerjee certainly gave the impression that his Calcutta visit took place before he gave his statement at Mirzapur, and that is how the learned judge understood him (*Vol 18, p 384, ll 3-6*).

An attempt was no doubt made in re-examination to repair the mischief of this evidence by eliciting from the witness the 27th December, 1932 as the precise date of his arrival in Calcutta, which of course he gave with due details calculated to impress (*Vol 3, p 123, l 35—p 124, l 4*), but this would still leave the Calcutta visit a long way behind the date of his commission examination, and leave accordingly every channel of communication open for that evidence

DOGMATIC STATEMENT ABOUT SHED AT SASAN IN 1905

If for all his astuteness Bebul's reference to Siddheswar De, not a Brahmin, be it noted, as one of the persons who carried the corpse, so hopelessly betrayed him in the result, the note of assurance with which the witness spoke about the next topic proved in the end no less disappointing. He was quite positive he saw a shed at the burning ground when he went to cremate the second Kumar, but as if this was not enough, he added with perfect nonchalance that he had seen the same shed in 1905 or 1906, even remembering the occasion which had taken him there that year, the death of Rai Bahadur Dr Das (*ibid, p 108, ll 11-22*),—this death alone being probably the fact, if D W 411, Anup Lal Goswami, can be believed (*Vol 17, p 315, ll 24-25*). It is now admitted that the new *sasan* had not come into existence at all in 1905 or 1906, far less the shed which Bebul pretends to have seen, then barely a lad of 13. Unfortunately for the witness, the way he spoke leaves no room for a suggestion that he might probably have been making a confusion with the shed at the old *sasan*.

In the earlier stages of the case, as shown already, the defendants' attempt was to obliterate the traces of an old *sasan* to which the Kumar's body might possibly have been taken for the evening cremation, and the only question on which it was sought to focus attention was,—shed or no shed, with the suggestion, very cleverly concealed, of a common site for both the evening attempt which failed and the successful attempt of the next morning. In aid of such a case, Bebul's evidence doubtless lent the most convincing support.

Mr Chaudhuri suggested that the defendants got this witness himself to prove the old *sasan*, and that he could not, therefore, be supposed to be denying its existence in his evidence. This is hardly, however, a fact. R N Banerjee no doubt proved the signature and handwriting in certain records and proceedings of the Hindu Burning and Burial Ground Committee (*Vol 3, pp 110-112*), but it will be seen from these documents (*Vol 1, pp 103-110, 113-114, 117-144 and 149*) that while they refer to the new *sasan* and to the construction of a shed at this spot, none of them give any indication of the previous existence of a cremation ground at a different site. The proceedings which might have furnished unequivocal evidence of this fact were carefully excluded, and it was left for the plaintiff to produce and prove the same,—such as *Ex 35* (*Vol 1, p 101*) through Swami Oankarananda, P W 603 (*Vol 8, p 94, ll 14-16*), and *Ex 203* (*Vol 1, pp 115-116*) and *Ex 204* (*Vol 1, p 112*) through Moni Mohan Sen Gupta, P W 960 (*Vol 11, p 37, ll 22 and 24*).

AFFECTED AIR OF TRUTHFULNESS

As the learned judge points out, R N Banerjee affected a certain "off-hand" manner in giving his evidence which really gave him away

(Vol 18, p 383, ll 22-26) Thus, for instance, on being asked when he first came to know that the Kumar was ill (Vol 3, p 116, l 6), he answered in quite supercilious fashion

"He was more or less always ill, but I was too young to know whether it was real illness, or it was the after-effects of excessive indulgence in liquor" (*ibid*, ll 7-9)

The excess of his cleverness, however, defeated itself. Personally he had never seen the Kumar drinking, as he had to admit afterwards, and what he had said was a "mere conjecture" (*ibid*, p 117, ll 14-15). He had only seen the Kumar with his brother Balen at Jones' Billiards Saloon, and as drinks were "the order of the day there", he drew the natural inference that the Kumar was addicted to liquor (*ibid*, p 117, ll 10-14),—as convincing an exhibition of logic as of truthfulness!

Then, again, as to what led him to make a statement before the Magistrate at Mirzapur and then to sign it (Vol 3, p 314, l 29 and p 118, ll 30-34), he raised himself to a high pitch of morality which only served to bring into relief his true level. He admitted there was no law or procedure he knew of under which his statement had been taken (*ibid*, p 114, ll 29-33). The Magistrate had also warned him that he was under no obligation to make a statement (*ibid*, p 118, ll 13-14). But he loftily declared that "a great fraud was about to be perpetrated", and he felt himself to be in honour bound to disclose the facts as he knew them, whether there was any statutory provision in this respect or not (*ibid*, ll 16-19 and 38-40). Quite right, and nobody would be disposed to quarrel with him that "as a gentleman and as a member of the English Bar", he should "do all in his power to vindicate the cause of justice and equity" (*ibid*, p 119, ll 1-3). But the rift in the lute was that all this virtuousness had not been in evidence at any earlier stage, though on his own statement this "very remarkable case of false impersonation" had been brought home to him by his own discussions in 1921 or 1922.

His introduction of Rithe, the servant and carpenter, was another of his small, but characteristic, touches of verisimilitude, (*ibid*, p 120, ll 32-33), but this unfortunately necessitated the services of this man being requisitioned for a purpose mentioned by no other witness, namely, to unscrew a tin partition across the verandah, so as to facilitate the removal of the body by the "cement staircase", which itself was sufficient to give him away (*ibid*, p 121, ll 17-20).

"CEMENT STAIRCASE"

The witness did not say in so many words that the body was actually brought down by the "cement staircase", but that is plainly what he indicated, and not the wooden staircase in the glazed verandah which he did not mention at all in this connection, and his evidence leaves it in no doubt that the nearest approach to his "cement staircase" would be the sloping path "built against the rivetment" by the side of the house that led up to the front room upstairs from the compound (*ibid*, p 120, ll 37-38, p 121, ll 2-6 and 35-36, and p 122, ll 1-3, 14-16), though according to Bibhabati herself the sloping path was neither cemented, nor stepped (Vol 12, p 314, ll 22-23).

His over-confident assertions only betrayed him into hopeless confusion as to the way the dead body was brought down or where the *khatra* was

placed for the reception of the dead body, with the result that he had to *volunteer* the statement "The *khatia* was under the portico adjoining the steps" (Vol 3, p 122, l 3), little realising that placing the *khatia* under the portico as he did, he still spoiled the effect of what he had been expected to say by the addition of the descriptive words "adjoining the steps", which was no doubt forced on him by the necessity of having to save his own evidence! By the "steps" he could only mean his "cement staircase", imaginary as it was, and not, as Mr Chaudhuri would suggest, a short flight of steps attached to the portico itself, which would be equally imaginary.

PATENT MARKS OF TUTORED EVIDENCE

This is only one more illustration how a tutored witness, conscious perhaps of his own importance, cannot at times resist the temptation of embellishing his evidence with unnecessary details outside his instructions, only to find when it is too late that in the attempt he has merely enmeshed himself in a tangle out of which extrication becomes a hopeless task.

It would be wearisome to refer to all the obvious marks of falsehood in R N Banerjee's evidence which he himself helped to expose by his excessive affectation of self-confidence: one or two instances will suffice.

Take, for example, the way in which he speaks of his visits to "Step Aside", where he says he had been at least ten or twelve times (*ibid*, p 115, l 33) during the Kumar's stay—sometimes going with his mother and sometimes only carrying "vegetables and other necessities" from her (*ibid*, ll 34 and 37-38) he would often again go there under instructions from her to take the landlord's munshi to show him any petty alterations and repairs that required to be done at the house (*ibid*, ll 34-37)—as if neither the Kumar nor Satyendra was competent to send for Ram Sing Sabha for the purpose, if there was really any occasion for doing so. And yet, if he is to be believed, Bebul was "not personally acquainted" with the Kumar (*ibid*, p 107, l 20), nor apparently with any of the other inmates of the house—except only the Rani (*ibid*, p 116, ll 30-35 and ll 1-2), neither did he feel interested in making any enquiries about the Kumar's health till one fine morning he received the information of his death (*ibid*, p 116, ll 15-17), though all along since the day of the Kumar's arrival he had been hearing about his "stomach troubles", and was in a position to assert that this was the cause of his death (*ibid*, p 116, ll 11-12).

Bebul was not sure at first if he had paid a visit to the house during the last two or three days (*ibid*, p 116, ll 20-22) all that he "knew" was that the Kumar had not been going out for his usual walks, and there was the further fact that his mother had been sending over "grapes and pomegranates"—fit diet for a biliary colic patient!—which led him to suspect an "aggravation" of the Kumar's illness (*ibid*, p 117, ll 22-26). Lest, however, this might be no more than mere inferential evidence of the illness, he had no hesitation a moment later to take himself to "Step Aside" during these two or three days, and that not once or twice a day but "off and on", when of course the Kumar was visible, not in his sitting room on the ground floor, but upstairs in his bed (*ibid*, p 117, ll 28-32).

Consider, again, the easy self-complacency with which he makes the second Rani discard the *purdah* in his favour, notwithstanding the strict Bhowal custom, some idea of which is given by the Chota Rani Ananda Kumari Devi in her evidence (Vol 14, p 84-85), and by the second Rani herself, who

EVIDENCE OF GITA DEVI

says in fact that she would "never see people with purdah off", even when her talukdars came to her for a personal interview with *nazars* or gifts of money (Vol 12, p 216, ll 11-12 and 28-29), and who would claim to be purdanashin also when she was having her first look at the plaintiff from her house in Lansdowne Road as he drove past in a phaeton with Buddhu (*ibid*, p 269, ll 23-24) At Darjeeling too the second Rani, a young girl of about 20 as she then was, would observe purdah, never going out of doors except in a rickshaw, and that again after dusk when she would not be seen (*ibid*, p 274, ll 15-18), and yet she would appear before and talk to this lad of 17 (Vol 3, p 116, ll 1-2), who had apparently made himself a *persona grata*, carrying fruits and vegetables from Kasawari Devi on the one hand, and acting as an honorary house-agent on the other, looking after necessary repairs and alterations

It is not necessary to discuss the evidence of R N Banerjee any further I do not believe a word of it, the information notwithstanding which he volunteered that he was a daughter's son of Rai Jagadananda Mukherjee Bahadur, a well-known citizen of Calcutta of his time who had been honoured with a visit to his house at Bhowanipore by His late Majesty King Edward VII as Prince of Wales (Vol 3, p 120, ll 21-23) I refuse to hold, either that Rahun was at "Step Aside" on the morning of the 9th May or that he attended the cremation on that day

GITA DEVI CALLED TO SUPPORT R N BANERJEE

Perhaps the most eloquent commentary on R N Banerjee's evidence is the action of the defendants themselves in calling Gita Devi as a witness to lend him such support as she could, without going the length of bringing this lady into "Step Aside" itself along with her brother-in-law Gita Devi (Vol 3, pp 159-172) was not a willing witness She had never deposed in her life, and it made her "angry" that she would have to do so (*ibid*, p 169, ll 16-17) She protested to her husband many times she was a lady and belonged to a respectable family, as such how could she depose? But her husband would not listen (*ibid*, p 170, ll 20-23) It was the month of October 1932 she had come up to Darjeeling with her husband to spend the Pnra vacation, and was staying at "Balen Villa" (*ibid*, p 169, ll 20-21) She did not know then who had instituted the suit or against whom it had been brought (*ibid*, p 169, l 49-p 170, l 2), and in any case she was not filled with her brother-in-law's resolve to come forward herself as a champion of "justice and equity" She was, however, a loyal wife, and did not find it in her to resist her husband's importunity "You will be asked one or two questions", said he "tell whatever you know from behind the screen" (*ibid*, p 170, ll 23-25) Poor lady, she asked innocently what were these "one or two things" she would have to tell (*ibid*, ll 26-27) One referred to the Rani, she was told, and the other to Balen's and Rabin's going to the cremation ground (*ibid*, ll 27-28) How did the husband know, by the way? He was not present at Darjeeling when the Kumar was there he was very probably, as his wife says, a Police Inspector at Muzaffarpur or somewhere else at the time (*ibid*, ll 28-30) Evidently his wife could not have confided to him at any earlier stage the facts she knew otherwise he would not ask her at the time of obtaining her statement, "what do you know about the death of the Kumar?" (*ibid*, p 169, ll 8-10)

Her husband was not a man to leave anything to chance He at once got her to make her statement, and typed it out himself she did not know

what he did with the statement it was enough for her he said he "had some use for it" (*ibid*, p 169, ll 10-11, 19-20, 21-23 and p 170, ll 36-37) She was not in a position to state if the defendants' lawyers Rai Bishadur Sasanka Coomar Ghose and Mr Pankaj Coomar Ghose had seen her husband at Darjeeling during the Puja vacation her husband might be asked about it (*ibid*, p 170, ll 31-35)

A "CONSCRIPTED" WITNESS

Speaking for myself, I cannot imagine a worse form of bringing undue pressure to bear on a Hindu pardanashin woman than the tactics which were employed by the defendants to get this lady to depose on their behalf when she was not willing to do so herself. The husband simply allowed himself to be turned into a conscripting agent to procure the evidence. It was not as though the husband was approached that he might ask his wife if she was willing to give her evidence, and then, if she agreed, that he might render the facilities necessary for her examination.

After all, on the defendants' own showing, where was the necessity of calling Gita Devi as a witness, except only to support Rabin's presence in the morning cremation by making her a spectator of the funeral procession in front of her house? They themselves must have felt that Rabin's word was not enough, nor would the evidence of other witnesses carry sufficient weight, but it is all the same a pity that they should thus have dragged in an innocent lady against her will to bolster up a case they knew to be false.

It is little to be wondered at that Gita Devi should have unconsciously failed the party who had pressed her into their service in this way. Even on points on which she was expected to speak, she gave herself away by the manner in which she volunteered her answers before the questions were put.

"VOLUNTARY" CHARACTER OF HER EVIDENCE

She is asked if she had any *Bhasu* (husband's elder brother). Yes, she says, and gives his name, but she can hardly hold herself, and involuntarily it comes surging out of her lips "it was he and my husband's younger brother Mr R N Banerjee who did everything" (Vol 3, p 159, ll 16-18). She has to be warned by defendants' advocate "Please reply only to the questions which we shall put to you" (*ibid*, l 20). Then, again, the question is "How did you know that he (Kumar) had died"? She starts off giving another part of her story—how her husband's elder brother, her mother-in-law, her husband's younger brother used to go to the Kumar's house every day, and how before his death owing to his illness her mother-in-law and her husband's younger brother would take or send fruits to him! (*ibid*, p 159, ll 29-34). She has again to be stopped, and reminded about the question to get the proper answer out of her! (*ibid*, p 160, l 1). Yet again, when she is asked, "Whom did they take?", she is not satisfied with saying that they "took the Bhowal Raja", but must add the important detail which was no doubt expected of her "They carried it by the road which was below her house. We saw it. The bier was covered with a shawl" (*ibid*, p 160, ll 19-22). She is asked a further question "When did your

husband's elder and younger brothers return?" The answer is "Please first ask me everything about the Ram and then I shall say"! (*ibid*, p 160, ll 36-38)

There could hardly be any clearer indications of the "involuntary" character of the evidence than this "voluntariness" on the part of the witness. One cannot but feel sympathy for Gita Devi in the predicament in which she found herself placed,—through no fault of hers except perhaps her unwilling, if not unquestioning, submission to her husband's will.

I have no doubt whatever in my mind that the learned judge was perfectly right when he suggested that R N Banerjee having damaged the case by his evidence, the defendants found it necessary to put his sister-in-law into the box to prop him up, if they could (*Vol 18, p 382, ll 12-15*). Gita Devi says no doubt that her statement had been taken by her husband in October, 1932 (*Vol 3, p 169, ll 19-20*), which was before R N Banerjee was approached to have his statement recorded through the Collector of Mirzapur (*vide* Collector's letter of 2-12-32, *Ex Z(136), Vol II, p 270*), but it is impossible to believe that Gita Devi was in the picture at all as a likely witness when her brother-in-law was examined.

ALLEGED ROUTE OF FUNERAL PROCESSION BY THORN ROAD TO BE VISIBLE FROM BALEN VILLA

The main fact it was sought to prove through her was Rabin's connection with the morning cremation, but not having stirred out of her house at all that morning, she was obviously not in a position to bear direct testimony to it. She might still, however, be a useful witness on the point, if she could say she had seen the funeral procession from her house and seen also her younger brother-in-law in it.

And this is exactly what she said she had done (*Vol 3, p 160, ll 21-26*), volunteering the first part of her statement even before she was asked about it. She did not know the house where the Kumar resided in fact she "knew nothing", as she emphasised more than once, being then only a young "baw" or daughter-in-law of the house who would not go out very much in those days (*ibid, p 159, ll 25-26, p 162, ll 29-30 and 31-32*). She knew enough, however, to be able to say "It was from our house that I saw It (the dead body) was carried along the road below our house. Then the people carrying it turned to the left and went straight to the bazar and then passed by the road leading to the cremation ground" (*ibid, p 166, ll 5-8*).

For her to see the dead body from "Balén Villa" would require the procession to pass along what has been referred to as the Thorn Road route, as distinguished from the alternative route by Commercial Row (*Vol 18, p 315, l 24—p 314, l 12*), the Thorn Road route, as the learned judge points out, going past the Victoria Hospital and past the Catchery Building opposite the Market.

It is curious, however, that not a question was asked of R N Banerjee and not a word said by him about the route of the procession, as most assuredly would have been done, if there was an idea at that stage of calling Gita Devi as a witness later.

The Thorn Road route would appear in fact to have been improvised for the first time with the examination of this lady,—an improbable route as it was, not only because of the *détour* it involved, but also because a dead body would not be usually carried along Hospital Road (P W 969, *Sash*

Mohan Das, Vol 11, p 98, ll 10-11 and p 102, ll 13-16), a fact which is not denied by D W 69, Surendra Mohan Chsnda, though he says that "if you go by the Thorn Road, you have to go by the Hospital Road, but not necessarily" (*Vol 13, p 224, ll 2-6*)

A MERE "AFTER-THOUGHT" TO "FIT IN GITA DEVI"

That the Thorn Road route, as the learned judge says, is "an after-thought to fit in Gita Devi" (*Vol 18, p 390, l 39*), is clearly shown by the statement which Brendra Chandra Banerjee admits (*Vol 15, p 351, ll 8-9*) he had made in the Sripur cases "The procession carrying the dead body, after crossing Chowasta passed midway between station and the bazar" (*Ex 350, Vol III, p 14, ll 36-38*) There can be no doubt that Brendra meant, by this the Commercial Row route, and it is absurd to suppose, as Mr Chaudhuri seemed to suggest, that counsel cross-examining the witness understood him to refer to the other route, he was doing nothing of the kind, but was really seeking to establish the Commercial Row route by the cross-examination This very statement was put to another defence witness, F E Holland, D W 306, who himself spoke of the Thorn Road route as the one followed by the morning procession, and he said "The route this gentleman indicates is quite different from the route I indicate" (*Vol 15, p 414, ll 19-20*)

It is not a fact that before Gita Devi was examined, the defendants made any definite case about the procession having passed in front of "Balén Villa", though to give it as much publicity as possible, a suggestion that the bazar lay on the way to the cremation ground from the Kumar's house was made to their witness Hsran Chandra Chakladar, who could not, however, say whether it passed by the side of the bazar or through the bazar (*Vol 1, p 377, ll 15-19*) Even if it went through the bazar, the procession need not have gone past the house of Gita Devi, unless it passed by the Cutchery Building, as to which there was no evidence and no suggestion at the earlier stage of the case

The key to the defendants' Thorn Road route would be the Cutchery Building, and not the bazar, the "bazar" being a loose expression which would be used to refer not merely to the stalls opposite the Cutchery Building, or to the open tract of level ground known as the "Market Square" or "Bazar Flat", and also, it may be added, as the "Parade Ground", but to the "Chowk Bazar" and "Chandmari" as well,—to indicate in fact the whole of the surrounding area stretching away from the "Market Square" on different sides, going even up to the Railway Goods Shed, if not beyond

Mr Chaudhuri made a futile effort to show that the plaintiff himself contemplated the Thorn Road route before Gita Devi's evidence, and referred for this purpose to a question which was put to D W Kanai Ram Mukherjee in cross-examination

"Q—You were proceeding towards the "Step Aside" from the Cutchery Building and they were proceeding towards the Cutchery Building with the dead body In this state you met together face to face?" (*Vol 1, p 367, ll 32-34*)

The witness replied in the affirmative, but it is perfectly clear that the question only meant that the procession was coming from the opposite direction, and involved no suggestion whatever that it passed the Cutchery

Building The witness had in fact already stated that he met the processionists as they came on the road, that is to say, the Rangit Road, "20 or 25 cubits away" from "Step Aside" he was going towards "Step Aside" from his quarters and they were proceeding towards the Chowrasta with the dead body, when they met face to face (*ibid*, II 27-31)

Equally pointless was Mr Chaudhuri's reference to the cross-examination of P.W. Sitanta Kumar Bagchi with a view to show that he also indicated the Thorn Road route, but this witness was not speaking of the morning cremation at all, and even as regards the evening procession which he was describing, all that he meant was that a number of men joined from the Old Cutchery Building (*Vol 2, p 449, II 28-29*) He was asked by what road the cremation party went to the burning ground, coming out from "Step Aside", and his answer as recorded in his original deposition in Bengali, and as I have satisfied myself, does not suggest that the procession passed *through* the bazar, as the translation in the printed record might lead one to suppose (*ibid, p 448, II 18-21*)

Counsel was wrong in saying that there was virtually no cross-examination of Gita Devi on the question of route It is true that there was no suggestion in terms of the alternative route *via* Commercial Row, but it was definitely put to her that the road leading from "Step Aside" to the cremation ground along which, according to her, the procession passed, was not at all visible from her house (*Vol 3, p 166, II 16-18*), which I consider to have been a sufficient challenge to her evidence As regards the defendants' earlier witnesses of the morning cremation, no case of route having been made by them, it goes without saying that the plaintiff was under no obligation to cross-examine any of them about it

I have no hesitation in recording my conclusion, in entire agreement with the trial judge, that the Thorn Road route was a pure invention of the defendants to suit the exigencies of Gita Devi's evidence, notwithstanding the surging tide of corroboration which set in afterwards

"CIRCUMSTANTIALITY" OF GITA DEVI'S EVIDENCE

As usually happens with such witnesses, Gita Devi, in attempting to invest her evidence with as much of circumstantiality as she could, only ended in landing herself in mis-statements, which, if Mr Chaudhuri was appearing on the other side, he would perhaps have himself described as false

She did not know anything about the Bhowal case before, but then she heard that the Kumar of Bhowal had come back on being restored to life, and read of it in newspapers also The Kumar had, however, "died in our presence" (*Vol 3, p 167, II 22-25*) A discussion was perhaps inevitable after this "Would there be no discussion if a dead man comes back to life? We never heard of such a thing Why we alone, nobody has heard of such a thing!" (*ibid, II 33-36*) A discussion did take place, and it was "elaborate", and lest there should be any mistake about it, it was joined in by practically the whole family—by her husband's elder and younger brothers, all of them, their wives, and also her mother-in-law, who were at the time staying in their Wellesley Street house in Calcutta (*ibid, p 167, II 29-33*) Not only this, but whether on this or on another occasion, her husband's elder brother,—who she stated was then alive,—was also seized with righteous indignation, and said, "A dead man has come back to life I will go and depose",—the self-same feeling which later inspired the younger brother to give his belated statement to the Collector at Mirzapur (*ibid, p 167, II 25-28*)

To be a story, the picture was not lacking in any particular only two small details were misplaced her husband's elder brother had died "somewhere about the beginning of the year 1918", and her mother-in-law in the month of October 1919, as stated by R N Banerjee (*Vol 3, p 107, ll 3-4 and 8-9*), whereas the Kumar of Bhowal "restored to life" had not come back until the end of 1920 or the beginning of 1921!

Gita Devi protested that there was no necessity for her to conceal anything in her deposition (*ibid, p 167, ll 14-15*) That is probably why in her examination-in-chief, *unasked* she said, the bier was covered with a shawl (*ibid, p 160, l 22*), and in cross-examination, again, when she was asked if the processionists had been saying anything as they passed along, she could not help repeating "I also saw that the dead body was being carried covered with a shawl" (*ibid, p 167, ll 3-5*)

In the procession, she saw her husband's elder and younger brothers, also many other people (*ibid, p 160, ll 24-25*) She did not know them all, and the 2 or 4 among them she knew, she could not name after such a long time, nor could she say if they were Brahmins or of any other caste. And then all on a sudden, perhaps because she was anxious not to keep back anything from the court, she suddenly broke out "I will not say even if I know that" (*ibid, p 167, ll 9-13*)

SUPPOSED CORROBORATION OF KASISWARI DEVI'S VISIT TO "STEP ASIDE"

Apart from Rabin's presence at the cremation, there was another important fact which Gita Devi was expected to prove, namely, her mother-in-law's visit to "Step Aside" on the morning of the 9th May. She was, however, not in a position to give direct evidence of this from personal knowledge. She only saw Kasiswari Devi leaving the house in the morning on receipt of the news of death (*ibid, p 160, ll 9-10*), and saw her returning at about 12 noon or 1 P.M. with the "widow" of the Kumar (*ibid, p 160, ll 29-31*). All the same she stated that her mother-in-law was in the Kumar's house that morning with the Rani (*ibid, p 160, ll 29-30*). This could, however, hardly be a fact on Gita Devi's own evidence on another point, as to which there was no need to make up a story, and naturally, therefore, she spoke the truth. It was as regards the scene at Kasiswari Devi's house when the Rani came there that day, which clearly showed that this was the first meeting between the two after the Kumar's death (*Vol 3, p 168, ll 4-39*)

UNTUTORED EVIDENCE AS TO SCENE AT BALEN VILLA

The plaintiff admits this visit of Bibhabati to "Balén Villa", but not that she was brought over there by Kasiswari Devi. His case is, she came with her uncle Suryya Naram, who was then living as a tenant in a part of the same house, with no women-folk, however, staying with him, as Bibhabati herself says in re-examination (*Vol 12, p 313, l 19*), and as is also the evidence of Shyamadas Banerjee (*Vol 1, p 271, ll 27-30*), and quite naturally, as the learned judge says, her uncle put her among the ladies at Kasiswari Devi's (*Vol 18, p 388, ll 38-41*)

I have no doubt whatever that the learned judge is absolutely correct in his finding. Surya Naram was admittedly, at "Step Aside" when the

cremation party left Satyendra's entry in his own diary shows it, and shows also that Kasiswari Devi was not there that morning, there being no mention of her name at all it merely records "*Sejomaima* remained with Bibha at 'Step Aside' Self accompanied the body" (*Ex 399(2), Vol 1, p 307, ll 6-7*) Satyendra in his evidence again admits that Suryya Narain took his sister to "Balén Villa" during the day, though he would have Kasiswari Devi going with him as well (*Vol 16, p 430, ll 36-39*) Bibhabati, on the other hand, would make Kasiswari Devi her sole escort, and have nothing to do with her uncle (*Vol 12, p 204, ll 30-31*) The vehemence of her protest, however, shows to my mind that the truth lay just the other way

"Q—Is it not a fact that next morning Suryya Narain took you to his house?

A—It is not a fact

I did not go to his house in the morning that day

Q—Did you not go to his house any time that day?

A—He used to live as a tenant in Kasiswari's house

I don't remember the address of that house but know it was a house of Kasiswari Devi, that is, of her husband Suryya Narain Babu was living in a part of Kasiswari Devi's dwelling house, which he had rented

Q—Did you at any time on Sunday go into the portion of the house rented by Suryya Narain Babu?

A—Kasiswari Devi took me to that house after mid-day" (*ibid, p 263, ll 6-17*)

Whether Kasiswari Devi was at "Step Aside" or not that morning, if Bibhabati was at all going to "Balén Villa", it is impossible to believe that her uncle who had been left behind to look after her should suddenly remove himself from the scene at the right moment,—in anticipation was it, one wonders, of the exigencies of his niece's case long thereafter?

As I have said, Gita Devi's untutored evidence as to what took place at "Balén Villa" that day seems to give the lie to her earlier statement regarding Kasiswari Devi's presence at "Step Aside" in the morning

A GRAPHIC AND A TRUTHFUL ACCOUNT

Gita Devi gives a graphic account of the scene, as the Rani arrived, wearing a coarse *dhoti* with a narrow border such as servants wear (*Vol 3, p 169, ll 4-6*)—(she spared herself a *than* or borderless *sari*, the proper wear for a Hindu widow, as she says she had none with her at Darjeeling) (*Vol 12, p 306, ll 12-14*),—and with no ornaments on her person (*Vol 3, p 168, ll 14-15*), the Rani's own story being that she had taken them off in her bath room at her own house where Kasiswari Devi had helped her to bathe (*Vol 12, p 204, ll 28-30*)

The Rani wept bitterly as she came, and after she was composed a little, Kasiswari Devi began to question her (*Vol 3, p 161, ll 2-6 and p 168, ll 11-12*) "What did your mother ask her?" "Mother said", Gita Devi replied, "Child! you have taken off your ornaments so soon?"

(I am taking the judge's translation, *Vol 18, p 389, ll 5-6*, which brings out the sense of the original much better than the English rendering in the printed record, *Vol 3, p 168, ll 7-8*)

Such a question, it is almost certain, could never have been put by Kasiswari Devi at her house, if she had been with the Rani at "Step Aside", practically helping her to take off the ornaments. Apart from this, as the learned judge points out, it is unthinkable that with a motherly lady like Kasiswari Devi present in the house, the Rani should be allowed to strip herself of her ornaments all at once the moment her husband's body was taken away (*Vol 18, p 388, ll 28-38*). Her very question is an expression of her bewilderment, and furnishes in fact the best answer to Mr Chaudhuri's fling at the learned judge that the latter was merely drawing on his imagination. He did nothing of the kind, but showed the truest understanding, and it is Mr Chaudhuri's clients who in fact proved themselves lost to all sense of propriety otherwise, in their anxiety to establish Kasiswari Devi's presence at "Step Aside" with the utmost certainty, they would not have put into the mouth of Bepin Khansama (*DW 140*) the realistic fiction they did regarding this particular episode.

BEPIN KHANSAMA'S REALISTIC FICTION

According to this faithful valet, the Rani had started flinging away her trinkets in her bed-room as soon as the dead body left the house. Some, however, still remained on her which she could not pull off, and these were removed from her person in the bath room when Kasiswari Devi took her there for a bath. Kasiswari handed these over to him, and these and the others taken off before, he tied up in a handkerchief. The bundle was afterwards made over by the Government Pleader's wife to Surya Naram, the uncle (*Vol 14, p 492, ll 19-31*).

Even this witness could not help admitting the "custom" referred to by the learned judge, though, as the latter points out, he tried to deny it the next moment (*Vol 18, p 388, ll 35-36*). In answer to a question from the court during cross-examination he said

"To Court I do not know if widows are made to take off all ornaments immediately upon death. Ornaments are not kept after cremation—but I do not know" (*Vol 14, p 504, ll 33-35*).

When he says, ornaments are not kept after cremation, what he means is that they are taken off only after cremation.

The other parts of the story as given by Gita Devi also show quite clearly that Kasiswari Devi could not have met the Rani earlier that morning, as in that case she would not have put her the questions she is said to have done. How came the end to be so sudden? (*Vol 3, p 168, ll 22-23*). "Had not the brothers been informed?" (*ibid, ll 25-26*). "What was he suffering from?" (*ibid, l 34*).

The Rani's answers as spoken to by the witness again go to prove the truth of this evidence—her reference to the telegram from the Bara Kumar (*ibid, p 168, ll 27-29*), her speaking of Calvert's treatment (*ibid, l 24*), and her mention of "blood dysentery or something like that" as her husband's ailment (*ibid, ll 37-38*), as well as her reference to the purchase of a new elephant by the Kumar before coming up to Darjeeling (*ibid, ll 13-14*), a fact afterwards confirmed by the evidence of P W 942, Kshirode Mohan Chakravarty on which there was no cross-examination (*Vol 10, p 388, l 41—p 389, l 2*).

As I have said, there is no reason to disbelieve this part of Gita Devi's evidence, and I agree with the trial judge that "it has the ring of truth": "there is no mistaking it" (*Vol 18, p 389, ll 15-16*). Bibhabati's visit to

"Balén Villa" being an admitted fact, it had probably not been considered necessary to prepare the witness about it, and she was left free to speak the truth.

In any case, there is no escape from the position that part of Gita Devi's evidence was deliberately false, and it is only reasonable to suppose that this was the part which she had to speak to under pressure. Speaking for myself, I place as little reliance on her as on her brother-in-law. I do not believe that she saw the funeral procession or saw R. N. Banerjee in it, or that Kasiswari Devi went to "Step Aside" on the morning of the cremation.

KASISWARI DEVI'S VISIT TO "STEP ASIDE" A SHEER CONCOCTION

The whole of the story about Kasiswari Devi is in my opinion a sheer concoction, and I doubt very much whether this lady had been to the Kumar's house at all on any day, or at any rate been a frequent visitor. The enquiries which according to Gita Devi her mother-in-law made of Bibhabati when the latter came to "Balén Villa"—what the Kumar was suffering from, which doctor was treating him, how the end was so sudden, or whether the brothers had been informed,—do not certainly suggest that Kasiswari Devi had been a daily visitor, sending "grapes and pomegranates" to tempt the Kumar's invalid appetite, as R. N. Banerjee and Gita Devi both so gushingly deposed.

According to both the son and the daughter-in-law, this good lady would be visiting the house of every Bengalee family at the station, rendering such assistance as she could (*Vol. 3, p. 116, ll. 28-29*), but it is rather curious that she should keep no information about Suryya Narain Mukherjee, though he was a tenant staying in a part of her house, and not know that he was the Rani's uncle till after the Kumar's death (*Vol. 3, p. 165, ll. 19-29*). She was certainly a benevolent lady, disposed to be friendly and helpful to people in difficulties, as was deposed to by both Sitanta Kumar Bagchi (*Vol. 2, p. 443, ll. 37-38*) and Satya Dhenu Ghosal (*Vol. 4, p. 2, ll. 23-34*) on the plaintiff's side, and by Kalpada Maitra (*Vol. 1, p. 350, ll. 6-9*) on the side of the defendants, but as Ram Sing Subha said (*Vol. 11, p. 79, ll. 23-24*), one did not know that she was in the habit of calling at the house of every Bengalee visitor to Darjeeling,—the exaggerated picture which the defendants would like to present for their own purposes.

It is not a fact, as Mr. Chaudhuri supposes, that the learned judge based his finding against Kasiswari Devi's visit to "Step Aside" on the 9th morning merely or mainly on the ground of the improbability of the story about the taking off of the ornaments from the Rani. The defendants sought to prove her presence at the Kumar's house on that day not only by this story, but also by showing that she sent the sacred thread and the Ganges water to the cremation ground through the nurse Jagat Molini, that she took over the Rani to her own house at mid-day and then reached her back in the evening after the cremation party's return, and generally, that she had made herself a familiar figure at "Step Aside" by her daily visits and her anxious solicitude for the Kumar. Each and every one of these facts, as has been shown, is disproved by the evidence of the defendants' own witnesses. On the top of all this, is the crowning fact that Kasiswari Devi is not mentioned at all by Satyendra in his diary. Satyendra, on his own account, started writing the diary about 9 or 10 days later, and if this lady had really played such an important part in the transactions of that day as she is now said to have done, it seems to be surprising and inexplicable that not a word should be recorded

about her doings in the diary, though it did not omit to record such momentous facts as that Satyendra had wired home for fruits

It is not necessary to deal with the evidence of R N Banerjee or Gita Devi any further, except only to point out that not a question was put to any of these witnesses if M N Banerjee, the Government Pleader, had made any proposal to Bibhabati regarding her making a donation to some charity in Darjeeling, as Satyendra could not help suggesting later under the stress of cross-examination (*Vol 16, p 522, l: 29-33*),—a point I have already dealt with

OTHER "STEP ASIDE" WITNESSES

Turning now to the evidence of witnesses who say that they were on the ground floor and merely saw the corpse being brought down, it seems to me that this body of testimony is as unreliable as that of those who, like R N Banerjee or Jagat Mohini or Shyamadas Banerjee, speak to having actually seen the dead body upstairs. If mere numerical strength told, the defendants must doubtless be held to have proved this part of their case, but a mere chorus of voices does not necessarily produce a symphony of truth

It would be an unprofitable task to discuss the evidence of each of these witnesses. Some of them did not get inside the house, but stood either on the road or at or near the gate, and still managed to see the body being carried downstairs by the wooden staircase at the end of the glazed verandah, while others merely noticed the body being brought out "from within" or through the room where they were waiting. The *khatia* again was placed by some under the portico, by some again at the end of the sloping path, and by yet others partly within the glazed verandah and partly under the portico. A little variation was probably introduced in the different versions on purpose, but it is evident they could not be speaking from genuine recollection

RAJENDRA NATH SETT

I might perhaps consider in some detail the evidence of one such witness Rajendra Nath Sett (*Vol 1, pp 300-313*), regarding whom Mr Chandhuri made a special grievance that the learned judge had referred to his testimony only on the question of identity (*Vol 18, pp 174-176*), but not in connection with the morning cremation. Mr Chandhuri maintained that this witness had been given a testimonial by the plaintiff himself as "a man of high position in society" whom there was no reason to disbelieve, relying for this purpose on the statement made by the plaintiff in paragraph 24 of his memorial to the Board of Revenue (*Ex J, Vol III, p 96, l 37—p 97, l 14*)

The witness was admittedly a friend of Satyendra, and was staying at Darjeeling in May, 1909, where he saw the Kumar for the first time on going to "Step Aside" with his friend (*Vol 1, p 300, ll 14-31*). He got the news of death from him at about 1 o'clock one night and went over at once with Bijoy Krishna Mukherjee and Tinkari Mukherjee, stopping on the way at Cutchery Building, from where 6 or 7 persons came out and joined them (*ibid, p 301, ll 4-16 and p 303, l 27*). They reached "Step Aside" almost at dawn, certainly after 3 o'clock (*ibid, p 301, ll 18-19*). He waited on the

ground floor, and some time after his arrival, he saw the dead body being brought downstairs, probably by Shvamadas Banerjee and Anukul Chatterjee amongst others (*ibid*, u 301, ll 23-37). He accompanied the funeral procession to the *sasan* where he saw the dead body cremated (*ibid*, p 301, ll 37-38 and p 302, ll 8-9). The body was identical with that of the Kumar to whom he had been introduced by Satyendra (*ibid*, p 301, ll 36-37).

If this evidence can be accepted, it should certainly carry the defendants the whole way. There are, however, certain features about it which demand consideration.

INTERVIEW WITH PLAINTIFF—A TRUE ACCOUNT IN PLAINTIFF'S MEMORIAL

In his memorial to the Board of Revenue the plaintiff recalls an interview which Rajendra Nath Sett had with him while he was staying at Bhowanipore, when, it is said, on hearing his answers to certain questions put to him, Rajendranath Sett was satisfied about the identity of the plaintiff as the second Kumar. He then informed the plaintiff that he had attended a cremation at 2 P.M. which Satyendra had led him to believe, and he had honestly believed, to be that of the second Kumar, and he had no opportunity to recognise the body at the time, as it was burnt fully covered up. He is said to have thereupon expressed his regret to the plaintiff that he had been misled into making such a statement in the course of the Government enquiry (*Ex J*, paragraph 24, Vol III, pp 96-97).

Mr Chaudhuri makes a point that the particulars of this interview were not put to the witness at all in cross-examination, but I have no manner of doubt the plaintiff gave a correct version of it in the memorial; it would really be out of the question for him to have invented a fictitious tale for the purpose.

One part of the story is in fact borne out by Rajendra Nath Sett's present evidence, as he admits having gone to see the plaintiff one day at Bhowanipore, which he no doubt says he did at the instance of Mr Dwarka Nath Chakravarty, and admits also having put questions to him to test his identity (*Vol I*, p 307, ll 17-31), and that being so, there is no reason to disbelieve the rest of the story as set forth in the memorial. If the witness now chooses to give a different version in court regarding the cremation, the natural inference, as it seems to me, is not that the plaintiff had concocted an elaborate falsehood to hoodwink the Board of Revenue, but that the witness for reasons best known to himself has gone back upon the statement he had made to the plaintiff. It may be taken for granted that a specific question put to him if he had made such a statement would have only elicited a categorical denial, and the absence of formal cross-examination seems to me, therefore, to be wholly immaterial.

One has only to read his own account of the questions he put to the plaintiff and the answers he got out of him, and see how, as he says himself, he was "astonished" at the answers (*ibid*, p 307, l 36—p 308, l 16). Coupled with the fact that he felt impelled to question Satyendra about the matter thereafter, though the latter merely laughed it away, and coupled also with his subsequent visit to Mr Dwarka Nath Chakravarty who asked him "just to go and tell Satya to compromise this sort of litigation and put an end to the row and tumult", (*ibid*, p 308, ll 18-22), there is only one

conclusion which this can possibly lead to, and it is that whatever Rajendra Nath Sett may now say in the interest of Satyendra as to having gone and cremated the body of the second Kumar, that could not have been his belief or impression at the time he met the plaintiff at the Bhowanipore honse, and most certainly, he must then have told him how he had made a mistake in stating anything to the contrary, and apologised to him for such mistake, as the plaintiff says in his memorial he did. To me the fact seems to lie on the surface that the same sinister influence which had caused him to believe at Darjeeling that he was witnessing the cremation of the second Kumar was operating again to produce a change in the conviction which he had expressed to the plaintiff.

PRESENT EVIDENCE TO THE CONTRARY A CONCOCTION

Rajendra Nath Sett's evidence itself gives sufficient indications that it was false and interested testimony. In his anxiety to give the fullest support to his friend's case, he went the length of saying that on going to "Step Aside" on two or three days to enquire about the Kumar, he came to know that the Kumar was suffering from *biliary colic* (*Vol 1, p 301, ll 1-3*), and he admitted that he heard this from Satyendra himself (*ibid, p 304, ll 11-12*). Coming to give evidence later, his friend, however, gave him away completely, being of course driven to do so by the exigencies of the case with which he was faced in cross-examination. "Biliary colic" was not in the telegrams from Darjeeling to the Bara Kumar, and Satyendra was obliged to say that he came to know the right expression only later on, but had no idea of it at the time he did not know the "technical name" (*Vol 16, p 481, ll 37-40 and p 482, l 11*).

Then, again, Rajendra Nath Sett says that when he went to see the plaintiff at the Bhowanipore honse, he was very much "surprised" to see a man with "red hair" and "tawny eyes" like those of the Kumar, and wondered if he was the plaintiff, but learnt later that he was no other than the Kumar's nephew Buddhu, son of Jyotirmoyee Devi, whose proper name was Jalad Mukherjee and who unfortunately did not live to give evidence for the plaintiff (*Vol 1, p 307, ll 31-35*). The witness admits that the Kumar had red hair and tawny eyes, and also that this was a distinctive feature of recognition (*ibid, p 308, ll 33-37*). And yet he utters the deliberate falsehood, for such it cannot but be, that

"Seeing the nephew I thought that there was some similarity with Kumar,—but then seeing that gentleman I found no similarity in my mind" (*ibid, p 308, ll 24-25*).

This he must have done on purpose to believe, if he could, the plaintiff's statement in the memorial, but in my view, he merely exposes himself in the attempt, and if anything, lends unwilling, but nevertheless the strongest support, to the plaintiff's story.

It is hardly necessary to refer to other parts of his evidence which must necessarily be false, if I am right in my conclusions regarding the matters he speaks to, as for instance, his story that he received a "chit" from Satyendra at about 1 A.M. in the night (*ibid, p 301, l 4*), or that he brought along Anuknl Chatterjee with him from Cutchery Building (*ibid, p 303, ll 27-28*), or that he came to "Step Aside" at night and found 15 to 20 persons present (*ibid, p 309, ll 27-28*).

NO ANSWER TO CASE OF SUBSTITUTED DEAD BODY

To sum up now the effect of the defence evidence regarding the body remaining upstairs or the face lying exposed, Mr Chandhuri's clients have, in my opinion, wholly failed to establish either of these facts. There was a dead body no doubt at the house since the early hours of the morning, but it lay on a cot on the ground floor and was covered over with a sheet from head to foot, as Dr Acharyya had seen. So far as the Rani was concerned, she was "having fits" upstairs, for which, as Satyendra notes in his diary, the doctors having "melted away", the two nurses who had been called in to attend the Kumar were kept on. The situation, so far as one can discern in spite of all the attempt to befog it by a cloud of false witnesses, was certainly not such as to have rendered the introduction of a dead body into the house some time before early morning an improbability, or "utter impossibility", as Mr Chandhuri would like to put it. Should any questions have been asked, all that need have been pleaded was utter helplessness in the face of storm and rain, which, driving away the local *sasan-bandhus* from the cremation ground, left the "Step Aside" party no option, however unfortunate, but to return with the dead body for the night, to take it out again the next morning.

Mr Chandhuri complains that such a case was not put to Bibhabati Devi in cross-examination, but it was certainly put to her brother if the body of the second Kumar had been taken away in the evening, brought back during the night and taken out again the next morning, which he denied (*Vol 16, p 540, ll 35-36*). To Bibhabati the suggestion was, and I consider that to have been enough, that she was in "fits", and all that she saw on the next morning was a covered body downstairs while she was on the upper floor. She in her turn denied it (*Vol 12, p 278, ll 3-12*). Satyendra was also asked about his sister's "fits", and admitted having heard about her denial of the same. He did not think that the fact of her having fits cut through the case he had made, and he repudiated the suggestion that he had wiped out the "fits" to make Bibhabati sit by her husband's bed-side all the time (*Vol 16, p 540, ll 29-34*).

As I have shown already, the attempt to counter the possibility of the introduction of a dead body during the night by bringing Kasiswari Devi into the house the next morning has signally failed.

Snryya Narain's presence at "Step Aside" early in the morning was doubtless intended to serve the same purpose, but he would certainly not be insisting on taking the cloth off the dead body to have a last look at the face, or refusing to accept any explanation which his nephew might offer to account for the failure of the evening cremation. From Satyendra's point of view, of course, the earlier his uncle arrived, the better it would be, and this probably explains the disfiguring of the letter "3" in his entry in the diary "Sent behara for *Sejomama* who came at about 3 in the morning" (*Ex 399(1), Vol 1, p 306, ll 12-13*), which necessitated a bit of interesting cross-examination.

"The figure '8' here is over-written. It looks like 3 over-written into 8. Looking at this I think Snrya Narain Babu came at 3 A.M., but I must read the whole of it (Witness does so). I am inclined to 3 A.M.—my recollection is he arrived at 3 A.M.

(Sees with a magnifying glass as the witness desires)
It looks like 3—3 was the original figure

"Q—It could not have been 8 at any time, nor does it look 8?

A—It looks like 8

(Sees through a magnifying glass)

I do not see that some figure, not 8, was altered to 3

I see it was 3 altered to 8

The alteration from 3 to 8 is not in deeper ink. The other writing is not in deeper ink. Originally the lines of the figure 3 were as broad as they are now. Not broader than the lines of the letters making up the rest of the writing, because I find other letters like that, some letters like that, e g, "&" below the 3 under consideration

To Court

The inner edge of the curved lines of 3 is deeper than the rest of the line—that is true of every line" (Vol 16, p 498, ll 12-20)

INDISCRIMINATE CALL FOR SASAN-BANDHUS

Another fact on which some stress was laid by Mr Chaudhuri to repel the suggestion of cremation with a "faked" body was what he described as an "indiscriminate" call for *sasan-bandhus* in the morning from all over Darjeeling, though there is no direct evidence on the point, but assuming it to have been so, there need have been no fear that anyone who had attended the evening cremation would turn up again in the morning, and even if any did, there would be no lack of a likely explanation to silence all questions

PROCEEDINGS AT THE SASAN

It remains now to consider the proceedings which are said to have taken place at the *sasan*. As pointed out already, it is admitted that the body was fully covered up all the way during its journey from "Step Aside" to the cremation ground. Thus, for instance, Bijoy Krishna Mukherjee says "When the procession started with the dead body, the dead body was covered from head to foot" (Vol 1, p 319, ll 33-34), and Lohendra Nath Banerjee also states "The dead body was covered on the way. So on going there, the covering was taken off" (*ibid*, p 338, ll 27-28)

WIDEST PUBLICITY GIVEN TO FUNERAL PROCESSION

The defendants were anxious from the very beginning to give the procession "the widest publicity" they could. This was in fact put almost as a leading question to Haran Chandra Chakladar in examination-in-chief, to which the witness of course responded with the utmost alacrity (Vol 1, p 377, ll 23-26), he having somewhat failed to catch the point of the earlier questions, directed to the same end, but in a less direct form, asking, first, if the bazar lay on the way to the *sasan* from the Kumar's house (*ibid*, p 377, ll 15-16), and then, when in answer, without being definite, he merely said

that the cremation party had to pass either by the side of or through the bazar (*ibid*, II 17-19), asking next, more pointedly, if he remembered that pice etc were distributed while so passing (*ibid*, II 20-21). Nobody will be deceived by Mr Chandhuri's suggestion that the object of the questions was to put the defendants' case of the Thorn Road route, and not to elicit evidence of "utmost publicity" for the funeral procession.

It will be seen that this distribution of coins etc was an unvarying feature of the evidence of every one of the defendants' cremation witnesses almost without exception. There is no reason to doubt that it had taken place as a fact, and it was certainly considered by Satyendra to have been an important enough detail to be duly chronicled in his own record, and not allowed to escape from memory. "Rs 200 distributed to the poor on the way to the funeral ground" (*Ex 399(2), Vol I, p 307, II 5-6*). It also figured prominently in "The Story of the Sadhu", there being a special question for it in the interrogatories circulated with the story. "Q 7 Was anything done during the procession?" with an N B added thereunder—"Whole rupees and small bits of coin were scattered and given to the poor during the procession" (*Ex 443, Vol II, p 240, II 28-29*).

This was in fact all that the plaintiff meant when he said in his memorial to the Board of Revenue that the cremation had been carried out "with full show of a ceremony" (*Ex J, Vol III, p 92, II 31-34*), the words used having no reference whatever to the supposed performance of full rites at the *sasan* itself.

OBJECT BEHIND IT

The learned judge considers the very pomp and publicity attending the procession to be an element of suspicion (*Vol 18, p 385, II 39-42*), but to Mr Chandhuri the argument is nothing but "absurd" and "unintelligible". It seems to me, however, looking at the matter from a plain and common-sense point of view, that the whole object of staging a second funeral would have been lost unless the widest advertisement was given to it, without of course doing anything which might involve any risks of exposure. The greater the publicity of the morning procession, the more likely was it to convey an impression of its absolute genuineness, and the more effectively calculated to suppress any possible whispers of a "scandal", either at Darjeeling or at Jaidebpur, arising out of the *contretemps* of the previous night. It would doubtless serve to conceal the fact of actual disappearance of the body, and merely suggest that the body had to be brought back at night for unavoidable reasons, and then taken out again in the morning for cremation.

There can be little doubt that if necessary, and if only they could avoid the chances of exposure, the "Step Aside" party would for a similar purpose have also gone through the whole gamut of shastric rites and ceremonies at the burning ground, but this was apparently considered to be neither indispensable nor a safe course to adopt.

STORY OF RITES AND CEREMONIES AVOIDED AT EARLIER STAGE

The defendants, however, though somewhat avoiding the mention of rites at an early stage of the case, were very particular later in giving evidence of the performance of such rites to the fullest extent, but unfortunately their witnesses overdid their part in purporting to recall the

proceedings of that day 25 years later, as if they were still fresh in their memory, giving one the inevitable impression that while pretending to give an account of what happened on that particular occasion, they merely recounted the incidents of a normal Hindu funeral, with such variations as were probably suggested to them by their own ideas, or by their actual experience of any cremations they might have attended

Thus, for instance, it will be seen that Bijoy Krishna Mukherjee said, contrary to the evidence of other witnesses, that the body had been laid on the funeral pyre *with face upwards*, but this was only because he thought "We Hindus do not place the dead body with face downwards" (Vol I, p 320, ll 8-10), which, however, was not the rule, for, as Kalipada Maitra stated from what he had seen at his own mother-in-law's cremation "In the case of males the dead body is placed with face downwards, and in the case of females with face upwards" (*ibid*, p 353, l 40—p 354, l 4), and so also said Tinkari Mukherjee from his experience of another cremation he had witnessed (Vol I, p 439, ll 21-22) Kalipada Maitra's actual observation, however, betrayed him in respect of another particular by making him introduce "*Antarjati*" as part of the rites at the Kumar's funeral (*ibid*, p 349, ll 18-19), apparently on no better ground than that this had been done in the case of his mother-in-law (*ibid*, p 353, ll 30-31) "*Antarjati*", however, as the witness himself explained, was a ceremony possible only where there was a river, in which the body was made to touch the river-water, but realising probably the incongruity in his evidence, he added that where there was no river, the ceremony was observed by holding the body in a slanting position and bathing it with water brought from somewhere (*ibid*, p 357, ll 15-20) Haran Chandra Chakladar, again, who spoke about the bathing of the Kumar's body at the *sasan* (Vol I, p 378, l 6), admitted that this was what he had seen being done at every cremation he had attended, though he did not know what the provisions of the *shastras* were in this respect (*ibid*, p 394, ll 14-19 and l 30) Mohendra Nath Banerjee also who spoke of the rubbing of ghee and the bathing of the dead body and the recital of *mantras*, evidently did so from his experience of his wife's cremation (Vol I, p 342, ll 11-14)

Apparently, in the course of the Lindsay enquiry no importance was attached to the performance of rites at the cremation ground neither in the questionnaire circulated with "The Story of the Sadhu" (Vol II, p 240), nor in the later interrogatories framed by R C Datta (*ibid*, p 246), is there a single question to be found touching this point Nor would it appear was any question raised about it at the Darjeeling enquiry when statements were being recorded by N K Roy, though some of the witnesses no doubt try to say that this had been done and rites actually mentioned by them at that stage, such as Kalipada Maitra (Vol I, p 357, ll 5-13, p 358, ll 1-3 and ll 31-37 and p 359, ll 1-4) and Kanai Ram Mukherjee (Vol I, p 374, ll 25-30) This strikes me, however, as obviously false evidence, and it seems a pity that the statements of such witnesses made to N K Roy were not produced by the defendants to repel such a suggestion on the part of the plaintiff Only three statements recorded by N K Roy have been put in evidence they are from persons who have deposed on behalf of the plaintiff in the case, Kshetranath Mukherjee, since known as Swami Onkarananda (*Ex Z(27)*, Vol II, p 227), Basanta Kumar Mukherjee (*Ex Z(42)*, *ibid*, p 234) and Nalini Kanta Chakravarti (*Ex Z(342)*, *ibid*, p 236), and in none of these there occurs a word about the performance of rites now so elaborately described by the defence witnesses, except that they all refer to the burning of the body, and Kshetra Nath Mukherjee says it was burnt with firewood, ghee, etc., though, by way of contrast, it may be noticed, each

of the statements expressly mentions the scattering of coins on the way during the procession

A "DANGEROUS TOPIC" IN VIEW OF PLAINTIFF'S CASE

It is absurd to suppose that the witnesses would, or were expected to, volunteer information on the particular point of performance or non-performance of rites, unless there was a specific question about it, whether or not they were asked generally to state what they knew about the cremation. If, as is the plaintiff's case, the cremation was in point of fact held without the usual Hindu rites, this to my mind would only make it probable that the defendants, whether in framing their interrogatories or in examining witnesses before the interrogatories were framed, should studiously avoid the question of rites as a dangerous topic, which, for aught they knew, might only result in eliciting inconvenient facts. It would be the same fear operating on them which had led to the avoidance of all reference to the question of the old or the new *sasan* at Kagghora,—the query in Q 5 in R C Datta's interrogatories as to which cremation ground was used (*Vol II, p 246*), being, as it seems to me, directed, not to either of these two alternative sites, but merely to find out whether it was the Kagghora *sasan* or any of the other cremation grounds in Darjeeling, such as are referred to, for instance, by D W 13, *Lofts (Vol 12, p 403, ll 23-25)* and P W 967, Ram Sing Subba (*Vol 11, p 69, ll 12-13*).

It is worthy of note that the plaintiff's case from the beginning was that no rites had been performed, this being not only the clear trend of their cross-examination of the defendants' cremation witnesses but also the evidence of Ram Sing Subba even in the Defamation Case, as set out in paragraph 28 of the memorial to the Board of Revenue (*Ex J, Vol III, p 99, ll 23-28*), where he is stated to have deposed as follows —

"I also found a tin of kerosene oil (a very unusual thing for purposes of cremation of the dead body of a Hindu). The dead body was not bathed. The white cloth was not removed. With the white cloth the dead body was placed upon the pyre. So nobody could see the face of the dead body. Oil and ghee was not rubbed in the dead body at the cremation ground."

To the same effect is the testimony of Ram Sing Subba in the present suit (*Vol 11, p 67, ll 18-23*).

PLAINTIFF'S WITNESSES

Among other witnesses of the plaintiff who give similar evidence is Swami Oankarananda Giri, P W 603 (*Vol 8, pp 93-100*), who, as already stated, gave a statement to N K Roy in May, 1921 (*Ex Z(27), Vol 11, p 227*). He says that the dead body was laid on the pyre wholly covered up, and it was not a fact either that the body was bathed, or that any Hindu rites were observed, or even a *pinda* (funeral cake) offered (*Vol 8, p 94, ll 31-32 and 40-41*). There was no *mukhagni* proper, fire having been applied to the mouth over the cloth which covered it.

Another such witness is Basanta Kumar Mukherjee, P W 823, (*Vol 9, pp 383-388*), whose statement to N K Roy is *Ex Z(42), (Vol 11, p 234)*. He also states that the body was placed upon the *chita*, covered up, cloth and

all, in the same condition in which it had been brought to the *sasan* there was no rubbing over with ghee, no bathing, no putting on of a new cloth and no offering of *pindas* before *mukhagni* (*Vol 9, p 384, ll 26-31*)

Still another witness who had similarly made a statement to N K Roy (*Lx Z(342), Vol 11, p 236*), is Nalini Kanta Chakravarty (on commission) (*Vol 11, pp 318-328*), whose evidence likewise is that the body was burnt covered from head to foot, without being besmeared with oil or bathed, in fact without the observance of any rites (*Vol 11, p 319, ll 20-22 and 30-31*)

Of these three witnesses, the learned judge holds that the last mentioned is "utterly discredited" by his former statement, but as regards the other two, there is in his opinion no material discrepancy in their present evidence which he accepts (*Vol 18, p 381, ll 11-37*)

Mr Chaudhuri suggests that these witnesses must have been all tampered with by the plaintiff and made to give evidence in direct contradiction to what, according to him, they had voluntarily stated before the Darjeeling Deputy Magistrate,—and stated, be it noted, at a time when the "story of the sadhu" had not yet taken formal shape. As regards Nalini Kanta Chakravarty, learned counsel would in fact rely on his former statement, as if this was substantive evidence, merely because before being shown the statement, the witness said that what he had told N K Roy was "nothing but the truth" (*Vol 11, p 325, l 25*), though on his attention being called to specific passages, he replied, saying—"I do not remember what I said then. But when it is recorded here, it may be that. That is, I might have said so" (*ibid, p 326, ll 25-26*), or, "I see it recorded there. But I don't remember what I said" (*ibid, p 326, l 31*), or, "When he has noted it, I might have said so" (*ibid, p 327, l 13*), or, again, "Probably he might not have asked me. I must have told—if he had asked me" (*ibid, p 327, ll 29-30*)

NO CONTRADICTION WITH PREVIOUS STATEMENTS

As I have said, I find it difficult to believe that any of these witnesses could have been asked about the observance of rites and ceremonies when they gave their statements to N K Roy. They are all agreed in saying that they must have answered only such questions as had been put to them. Admittedly the questionnaires had not yet been prepared, but even if one were to accept Mr Chaudhuri's suggestion that the Darjeeling examination could not but have proceeded on the lines of some such questions, it seems to me that the interrogatories which could have been anticipated at that stage would be only those that came to be framed later by Rai Bahadur Sasanka Coomarr Glose (*Vol 11, p 240*), and not those subsequently drawn up by R C Datta (*ibid, p 246*), seeing that the Rai Bahadur was present on the spot at the time. It will be observed that the Rai Bahadur's questionnaire does not contain any such general question as q 9 of R C Datta. "The deponent should be asked generally if he remembers any other facts connected with the illness, death or cremation of the Kumari." The Rai Bahadur has a question No 6 "Can you remember any incident either at the house before the procession started or during the procession or during the cremation?", but this can hardly be said to have the same general content.

And yet it is surprising that learned counsel of the eminence and experience of Mr Chaudhuri should have deliberately sought to mislead the witnesses by suggesting that the specific questions in R C Datta's interrogatories, particularly those numbered 8 and 9, had been put to them by

N K Roy If I may say so, the learned judge's comments on the point are more than justified (*Vol 18, p 317, ll 12-16*) It is no wonder that the witnesses, deposing 13 years later without a previous opportunity of seeing their former statements, should unwarily walk into the trap so adroitly laid for them

In the circumstances, I am not disposed to attach any importance to some of the answers which they were led to give in cross-examination

SWAMI OANKARANANDA

To take Swami Oankarananda, for instance, it appears that on being shown in court the printed questionnaire, not, be it noted, of Rai Bahadur Sasanka Coomar Ghose, but of R C Datta, he stated at once that he could not recollect at this distance of time if N K Roy had put these questions to him (*Vol 8, p 96, ll 40-42*), but on counsel still persisting in his suggestion, the witness said that the interrogatories shown to him included some of the questions put, and perhaps did not include others (*ibid, p 97, ll 1-2*) Mr Chandhuri would not leave him there, but went on to question him specifically with reference to the interrogatories, and then witness said "The questions 1 to 7 on this paper were certainly put to me, but about the questions Nos 8 and 9 I have no definite recollection" (*ibid, p 97, ll 2-4*) Not content, counsel still persevered till he was able to elicit the following answer "Probably I said that his face was covered I did not tell him that I had never seen so extraordinary a Hindu funeral before I said that there was no ceremony at all" (*ibid p 97, ll 7-9*)

There can be no doubt that this was trying to extract out of the witness something which is admittedly not to be found in his previous statement, but I am clearly of opinion that one must accept what is contained in the statement itself, and not the witness' present forced recollection of it That was in fact counsel's final suggestion to the witness himself, which the latter accepted

"Q—That the face was covered, that there were no rites, that it was an extraordinary funeral are not there?

A—No

Q—I put it to you that your former statement gave no indication whatsoever of the kind of extraordinary cremation you say it was?

A No" (*ibid, p 97, ll 13-18*)

In my judgment, the sole question to consider about the former statement is whether there is anything in it which may be supposed to contradict his present evidence, and I agree with the learned judge that the answer must be in the negative The statement does not certainly show either (1) that the witness had seen the face of the dead body uncovered, or (2) that due shastric rites had been performed, or (3) that the funeral was not an extraordinary one

Swami Oankarananda is no doubt recorded as having stated to N K Roy that "the body was that of a stout, strong and fair complexioned man",—a description which bears almost a family likeness to the "fair complexion", "stout build" and "strong physique" of Rai Bahadur Sasanka Coomar Ghose's story of the sadhu (*Vol 11, p 240, ll 2-3*), and is almost suspiciously

suggestive of the source from which it emanated, but as he explains in his evidence, when the corpse was placed on the *chita* the covering over it slipped off, exposing a part of the body (Vol 8, p 93, ll 29-31 and p 94, ll 32-33), and he got the impression that the man was "fair" (*ibid*, p 100, ll 21-22) he had not seen the complexion at "Step Aside" (*ibid*, p 96, l 15). This statement no more indicates that the body lay with the face exposed than his other statement that a "Kumar's man" set fire to the face of the deceased, which certainly does not mean that the fire might not have been applied over the cloth on the face (*ibid*, p 96, ll 22-23). On the other hand, the story he relates about Nathu Dome trying to take away the apparel of the Kumar would be consistent with the plaintiff's case and the witness' present evidence that the body was laid on the funeral pyre with his clothing on. As for the performance of rites, this is certainly not indicated by the statement that the body was burnt to ashes with firewood, ghee, etc., the ghee, as he explains, having been put on the fire and not on the body (*ibid*, p 96, l 31). Generally, as to the question whether it was or was not a normal funeral, he must doubtless have been struck with the unusual character of it, but the Kumar's own people having been present and carried it out in that manner, it would not be for him either to reason why or to make reply.

I can find no reason whatever for not accepting the evidence of this witness, a man who had forsaken the world and forsaken his name, having adopted "sannyas" after two years' *brahmacharyya* at Hardwar, with no wife and no children, and with no earthly attractions to tempt him from the path of virtue (*ibid*, p 93, ll 11-14), say what Mr Chandhuri will.

I cannot help remarking that if the facts were really as the defendants pretend they were, it should have been for the people who had rushed up to Darjeeling to pin down witnesses at the earliest stage to signed statements in the presence of a Magistrate, to get these deponents to clear up all possible points of importance which might be supposed to affect their case. According to Mr Chandhuri's clients, the fact of the face having remained uncovered both at "Step Aside" and at the *sasan* was so strikingly obtrusive that none of their witnesses were able to let it go out of their mind, and still it is curious that this should not have been brought out clearly in any of the Darjeeling statements. They had not forgotten to ask about the scattering of pice in the procession, and yet asked no direct questions as to whether the face was exposed or the usual rites were observed!

BASANTA KUMAR MUKHERJEE

As regards the next witness, Basanta Kumar Mukherjee (Vol 9, pp 383-388), in his statement to N K Roy (Vol II, p 234), not only did he not say that he had seen the face, but he stated on the other hand that the body "was brought out on a cot of the house covered with a cloth", and expressly mentioned that he "did not notice the face of the corpse to which fire was set by a young man who was found weeping bitterly", by which, as he explains, he meant he had not seen the act of *mukhagni* (Vol 9, p 387, ll 12-13 and 27-29). He did not even speak to the firewood and ghee etc., mentioned by Swami Oankarananda, with which the body was burnt.

In his case, too, there was the same attempt to force him to admit that the questions in R C Datta's set of interrogatories had been put to him by N K Roy (*ibid*, p 386, l 11 and p 387, l 3). He said, however, he could

not recall the questions, but could only speak to his statement (*ibid* p 386, ll 12-13), though quite honestly he expressed himself unable to deny after such a long lapse of time that such questions might have been asked (*ibid*, p 387, ll 4-5)

Mr Chaudhuri had even the temerity to suggest to him that he had been asked by N K Roy about the route of the procession, but that he had given no answer! The witness was emphatic in his denial "Impossible", he said, "What he asked I must have answered" (*ibid*, p 387, ll 22-24)

I have no hesitation in holding that Basanta Kumar Mukherjee's evidence stands wholly unshaken. Much as counsel might have tried to make the jade wince, his withers were unwrung.

NALINI KANTA CHAKRAVARTY

As regards Nalini Kanta Chakravarty (examined on commission) (*Vol* 11, pp 318-328), as I have indicated, it is doubtful if his former statement can be treated as substantive evidence at all. He is supposed to have said to N K Roy that at the cremation ground the dead body was uncovered (*Ex* Z(342), *Vol* 11, p 236), but in his present evidence he says that such a statement would be "absolutely false" (*Vol* 11, p 326, ll 1-3 and ll 29-33). He admits that the cremation had appeared to him "very unusual", but he thought that there might be different practices in different parts of the country (*ibid*, p 322, ll 25-28), and he adds that he must have told N K Roy about the abnormal funeral, if he had been asked about it (*ibid*, p 327, ll 29-30). Speaking for myself, I should certainly be prepared to accept what he now says in preference to what he was probably made to say at Darjeeling, though the learned judge, on his part, in his evident anxiety to be as fair to the defendants as possible, was quite willing that this evidence should be left out of consideration altogether (*Vol* 18, p 381, ll 11-13 and l 22).

DEFENCE EVIDENCE OF CREMATION RITES AND CEREMONIES SHYAMADAS BANERJEE

Shyamadas Banerjee on behalf of the defendants gives a fairly full account of the rites which are supposed to have been performed at the *sasan*. The clothes were taken off, the body besmeared with ghee, and then bathed with water—brought from the *ghora*, as he says (he had apparently forgotten the Ganges water),—a new cloth then wrapped round and the sacred thread put on, after which the body was lifted on to the pyre, with still another cloth put on it. Gold, silver, etc were then placed at the "nine doors of the body" before the final act of *mukhagni* or setting fire to the face was done (*Vol* 1, p 257, ll 29-37). By some mischance, the recital of the *mantras* appeared to escape his recollection, though he remembered that Sashi Banerjee, an accountant at Darjeeling, "perhaps" acted as priest (*ibid*, p 261, ll 4-5), this Sashi Banerjee being presumably the man who with Satya Prosad Ghosal afterwards signed a certificate of cremation (*Ex* Z(202), *Vol* 1, p 183).

His memory for details, however, betrayed the witness into making a statement as regards a small matter, which amounted to an indirect admission of the truth of the story told by the plaintiff's witnesses of the morning cremation. He said that one or two tins of ghee,—and he even remembered it was "*Bhaisa ghee*" (or ghee prepared from buffalo milk),—had to be

specially requisitioned to be thrown into the fire in order to make the body burn quickly (*Vol 1, p 260, ll 35-38*),—a fact confirmed later by other defence witnesses, such as Rajendra Nath Sett (*Vol 1, p 302, ll 26-27*), Kanai Ram Mukherjee (*Vol 1, p 370, ll 18-26*) and R N Banerjee (*Vol 3, p 109, ll 1-2*)

Mr Chaudhuri was very anxious to make out that the plaintiff's witnesses who had given statements at Darjeeling must have been asked about the performance of rites, but it will be seen that this witness of his Shyamadas Banerjee admits that Lethbridge had not asked him anything about it, nor did he have anything to tell him on the point (*Vol 1, p 264, ll 9-10*), and he was not the only one among the defendants' witnesses to make such admission. Some of them no doubt pretended otherwise, as for example, Mohendra Nath Banerjee, who first stated that "all those things were not asked then", and then pulled himself up, saying that "being absent-minded" he had made this statement. "I am now saying from memory that I stated all those facts before Mr Lethbridge" (*Vol 1, p 335, ll 21-23 and 30-35*). Kalipada Maitra, again, when asked if he had stated to N K Roy anything about the body having been burnt with the help of ghee, fuel, resin and sandal-wood, could only express his bewilderment by asking himself "Did I tell these words or not?" The plaintiff's pleader asserting, "That is my question", the witness pathetically declared, "I do not understand that"! The question had to be repeated, and then he said that as far as he remembered, Mr Roy had asked him "In what way was the dead body burnt?" (*Vol 1, p 358, l 31—p 359, l 2*). Kanai Ram Mukherjee was similarly asked if he had said anything to N K Roy as to the rubbing of ghee, bathing, uttering of *mantras*, or performance of *mukhagni*, and his answer first was, "Mr Roy did not put all these questions to me and I did not answer", but he forthwith added, "I think I spoke about *mukhagni* and uttering of *mantras* etc" (*Vol 1, p 374, ll 25-29*).

It seems to me, as I have said before, that if full rites had been observed at the cremation, as is now alleged by the defendants, they would not have allowed themselves to miss such an important fact either at the stage when statements were being recorded at Darjeeling, or in the course of the enquiry which came to be initiated later by Lindsay, and there would not have been such evasive answers from their witnesses.

BIRENDRA CHANDRA BANERJEE

The most vivid picture of the proceedings at the *sasan* comes from DW 290, Birendra Chandra Banerjee (*Vol 15, pp 314-377*), a man whose performances in the witness box could be described as unique, if only the defendants had not kept him in countenance by producing many a prototype of him. He had deposed in the Sripur case (*Ex 350, Vol III, pp 5-17*), and there is hardly a statement on any material point in that deposition on which he has not shamelessly gone back in his present evidence—the best apology he could offer was "I did not realise that I told an utter falsehood then" (*Vol 15, p 346, l 40*). It is this witness who had kept Calvert in the house from 4 to 12 P.M. on the 8th May (*ibid, p 346, ll 21-35 and p 355, ll 14-17*), though it is now admitted by the defendants that Calvert went home after dusk (*ibid, p 347, ll 1-4 and p 355, ll 20-21*), and it is he, again, who, it will be remembered, had made Calvert send the "telegram of death" to the Barn Kumar (*ibid, pp 347-349*).

PERFORMANCE OF MUKHAGNI

It appears to be a fact that the *mukhagni*, or the show of it, was performed by this man Satyendra duly keeps a note of it in his diary—"The fire was set by Birendra" (*Ex 399(2)*, Vol 1, p 307, l 7) It is not, however, without significance that Rani Bibhabati was not taken down to the *sasan* for this last rite to her deceased husband, which was at once her duty and her right by preference under the Hindu shastras. This was an omission which could not be explained by saying that she was physically unfit at the time, the defendants' own evidence being that she was in a condition to go to "Baln Villa" that morning, nor would it be a sufficient excuse merely to show that on the death of Bara Kumar or of Chota Kumar, the *mukhagni* of either brother was not performed by his widow. In the case of Chota Kumar, there is the evidence of the Chota Rani herself that on the day of her husband's death which took place at the Nalgola House at Dacca, she was laid up with fever with a temperature of 102 and was removed by the Civil Surgeon to a house at Imamganj under the Collector's orders (*Vol 14*, p 24, ll 11-14 and 19-21), and it appears, as stated by Ananta Kumari Devi, that the *mukhagni* was done by Akshoy Roy, an agnatic relation, at Jaidebpur where the body was cremated (*Vol 1*, p 480, ll 20-23). At the time of Bara Kumar's death which occurred at Jaidebpur, his Rani was no doubt present at the Rajbari (*Vol 1*, p 480, ll 8 and 16), but there is nothing to show that she had no sufficient reason for not attending the cremation, or that near enough kinsmen like his own younger brother were not there to perform the *mukhagni* the Bara Rani, though examined as a witness for the plaintiff, was not questioned about it herself.

BIRENDRA'S QUESTIONABLE RIGHT TO PERFORM MUKHAGNI

Quite different was the position at Darjeeling. Not only was there no excuse for not taking the second Rani to the *sasan* on the ground of any alleged physical incapacity on her part, but her presence at the cremation was both necessary and proper, seeing that no relation, agnatic and cognatic, was available there to take her place for this important rite. And yet nobody thought of her at all in this connection, Shyamadas Banerjee's evidence being that when the "Step Aside" party started for the burning ground, no one suggested that Bibhabati should go (*Vol 1*, p 260, ll 14-16),—a fact which one finds it a little difficult to reconcile with the defendants' professed anxiety for the due observance of full shastric rites down to the sacred thread and the Ganges water. Haran Chandra Chakladar merely remembered a talk between Satyendra and some other persons, not himself, at the *sasan* as to whether the Kumar's wife should come and perform the *mukhagni*, and Satyendra saying that she was too overwhelmed (*Vol 1*, p 388, ll 38-42), which was probably a fact, but which, as every Hindu would appreciate, would still be no adequate explanation whatever for keeping her back.

It is no doubt claimed that Birendra Chandra Banerjee was a "near kinsman", but on his own evidence the claim is no more than a pretence. He was a kinsman only in the way that one touch of nature would make the whole world kin. His father's elder brother, as he says, had married a sister of Akshoy Roy, the latter being an agnatic uncle of the Kumars (*Vol 15*, p 314, ll 34-36). According to Jyotirmoyee Devi, P W 660, Akshoy Roy was her father's kinsman and her "distant uncle" (*Vol 8*, p 289, ll 27-28). Akshoy Roy's younger brother Shyamapada Roy's widow Ananta Kumari Devi

has been examined on behalf of the plaintiff, and she also says that the Kumars' father Raja Rajendra Narayan Roy was Akshoy Roy's and her husband's agnatic cousin (*Vol 1, p 464, ll 29-30*) But even supposing that instead of being a distant agnate, Akshoy Roy was Raja Rajendra Narayan Roy's own brother, Birendra Chandra Banerjee would still not be a kinsman or *bhūma-goīra sapinda* Birendra's father's brother having married Akshoy Roy's sister, their son might be such a *sapinda* or cognatic relation, but how this fact would establish a blood relationship, near or remote, with Birendra's father or with Birendra is more than any known rules or principles of Hindu Law can account for Birendra himself stated in his Sripur deposition that *asaucha* (or mourning on account of death) in the Kumar's family created *asaucha* of Akshoy Roy for 11 days, not that it similarly affected Akshoy's sister's family (*Vol III, p 5, ll 14-16*)

It is not surprising that the Chota Rani Ananda Kumari Devi, D W 89, should say "I do not know whether Birendra Banerjee was related to the Raj family I have never heard of it" (*Vol 14, p 56, ll 20-21*) Satyendra describes him as "a relation and employee of the Kumar" (*Vol 16, p 430, ll 34-35*) the "relation" was a myth, the "employee" alone was a fact, Birendra himself admitting that at Darjeeling he kept the account of household expenses (*Vol 15, p 376, ll 11-12*)

In my opinion Birendra Chandra Banerjee had as much right to perform the Kumar's *mukhagni* as the "*sala babu*" Satyendra Nath Banerjee might be supposed to have Birendra purported to do the act no doubt, but this was because he could be easily passed off as a kinsman The main object must have been to keep Bibhabati off the scene, though, as stated above, she should have been the person to perform this last rite to her husband

Defendants' witness Tinkari Mnkherjee admitted that where there was no issue, the wife generally did the *mukhagni* (*Vol 1, p 439, l 36*) He speaks of a case where he saw the *mukhagni* of a destitute Brahmin widow done by the Brahmins who carried the body (*ibid, p 439, ll 28-32*), just as Haran Chandra Chakladar came across a case of a deceased Brahmin who had no relation in which this particular ceremony was performed by another Brahmin present at the spot (*Vol 1, p 394, ll 28-30*), but these were exceptions which only went to prove the general rule that *mukhagni* was as much the duty as the privilege of an agnatic kinsman or a person of the same *gotra*

RECITAL OF MANTRAS BIRENDRA'S IMPROVISATION OF A SECOND PRIEST

In the Sripur case Birendra was somewhat restrained in his description of the part he had played at the cremation, merely stating that he had bathed the body and applied fire to the mouth (*Vol III, p 6, ll 24-25*), but adding a detail about the uttering of *mantras*, which he could not foresee at the time would push him into rather a tight corner in the course of his present evidence It was Ambika Thakur, he stated on that occasion, who had acted as priest and made him recite the *mantra* of *mukhagni* (*ibid, p 6, ll 25-27*) Unfortunately for him, however, some of the commission witnesses of the defendants in the present suit, perhaps from a similar anxiety to embellish their evidence with details, but oblivious of the consequences which they might be thereby bringing on for Birendra, happened to introduce a different priest in the person of Sashi Bhimsan Banerjee, such as Kanan Ram Mnkherjee for the first time (*Vol 1, p 364, ll 33-34*), and R N Banerjee after him

(Vol 3, p 109, l 3).—Shyamadas Banerjee anticipating them only to a guarded extent (Vol 1, p 261, ll 4-5), but a later witness, D W 101, Satya Prosad Ghosal going very much beyond, stating in fact that he did not remember any other man besides Sashi Bhusan Banerjee having uttered the *mantras* (Vol 14, p 298, ll 1-2 and 24-26)

Faced with this sudden conflict in the evidence, Birendra of course at once rose to the occasion, and put up a brave effort to reconcile the discrepancy by "just remembering" that with Ambika Thakur there had been "another man" (Vol 15, p 357, ll 17-19 and 25-26) Birendra admits he had read his Sripur deposition before coming to depose in this case, but not before he had given his statement to the defendants' lawyers (*ibid*, p 338, l 34—p 339, l 7) this particular passage, however, had not "excited" his attention at the time (*ibid*, p 357, ll 22-24) One has only to read the story he concocted then and there that Ambika Thakur had been reciting the *mantras*, while the other man stood by to correct his "lapses", to see how a lying witness gets entangled in his own meshes (*ibid*, p 358, ll 12-29)

DR ASHUTOSH DAS GUPTA

It is no wonder that Birendra got his worthy compeer Dr Ashutosh Das Gupta, D W 365, to back him up "Who was the *purohit* (priest)?"—Dr Das Gupta was asked in examination-in-chief, and he said without hesitation "A cook called Ambika and a *bhadralog* (gentleman) of Darjeeling who uttered *mantras* with the cook at the same time as he" (Vol 16, p 244, ll 12-14), his memory, if anything, becoming more distinct in cross-examination, as he remembered that the *bhadralog* of Darjeeling was a Bengalee (*ibid*, p 288, ll 24-27) Quite characteristically he was not at all deterred by the fact that he had made a different statement in the Defamation case

"There was a priest He was a Hindu I cannot give his name I saw him at Darjeeling before second Kumar's death I cannot say whether the priest went to the place of cremation before or after us (Says after) He went with us I do not remember where I saw the priest before I saw him for the first time at our house at Darjeeling on the day of the second Kumar's death I cannot say if the priest was an up-countryman or a Bengalee" (Ex 395 (1), Vol II, p 361, ll 15-22)

"I cannot say what the priest did at the place of cremation" (*ibid*, l 25)

This was put to him, but he said with the utmost unconcern that he had stated what he then believed to be true (Vol 16, p 288, l 31)

SATYENDRA'S FAILURE OF "DEFINITE RECOLLECTION"

Satyendra, who came to depose still later, was, however, more cautious With every desire to support his brother-in-law's "near kinsman", he could not yet muster up courage enough to go the same length as he, but avoided a pitfall by failing to have "a definite recollection of the man who officiated as the priest", though he remembered "the act of the *mantras* being chanted", and remembered also that it was "some local gentleman" who chanted them, and as if to prove his defective recollection, he first said that the *mantras*

were uttered after the body had been placed on the pyre and not before, and then added "*Mantras* were chanted before that also, I think I remember thus" (Vol 16, p 539, ll 22-33)

RECITENCE OF EARLIER COMMISSION WITNESSES ABOUT *MANTRAS*

It is to be observed that the earlier commission witnesses were studiously silent about the reciting of the *mantras* Shyamadas Banerjee would have no "priest" at first, but when in a moment of weakness he happened to introduce one, the utmost length he could go was to make Sashu Banerjee "perhaps" act as a priest (Vol 1, p 261, ll 4-5) still, however, he would have none of the *mantras* Jagat Mohini was apparently too tired with her sacred thread and her Ganges water either to observe a priest or to hear any *mantras* uttered Rajendra Nath Sett probably had his whole attention divided between the two additional tins of ghee which had to be indented to avoid the use of kerosene oil (Vol 1, p 302, ll 26-27) and the "Gangaputra" (or Dome) who cast felonious eyes on the Kumar's shawl (*ibid*, p 302, ll 4-6 and p 309, ll 13-16), which last he apparently felt bound to observe, because Kshetra Nath Mukherjee (Swami Oankarananda) had mentioned it in his Darjeeling statement (Vol II, p 227, ll 17-22) Bijoy Krishna Mukherjee also duly remembered the shawl incident (Vol 1, p 320, ll 1-5), but his recollection evidently got somewhat confused, connecting it with one "Balai Babu" and making this person "perhaps" the carrier of Ganges water and *tulsi* leaves as well (*ibid*, p 320, ll 27-29) rightly enough, however, his memory was a perfect blank about the *mantras* Mohendra Nath Banerjee just remembered enough to mention "Sashu Babu", a man whom he respected, as among those present, but nothing about the *mantras* which this gentleman is supposed to have uttered (Vol 1, p 340, ll 32-33), though he could vividly recall the picture of the dead body raised into a sitting posture, as it was rubbed with ghee, bathed and dressed in a new cloth (*ibid*, p 340, ll 9-10 and 17-20) Kalipada Maitra was evidently too much engrossed with the thought of doing the Kumar the honour of "*antargrah*", the same he had rendered to his mother-in-law, to give his attention to the supposed recital of *mantras* (Vol 1, p 349, ll 18-20)

FIRST MENTION BY KANAI RAM MUKHERJEE

It was Kanai Ram Mukherjee, the next witness examined on commission, who for the first time lapsed into a mention of *mantras*, following it up readily with the plausible story that they had been recited by "Sashu Bhusan Banerjee attached to the Deputy Commissioner's office of Darjeeling" (Vol 1, p 364, ll 33-34) Having said so much, the elaboration which followed in cross-examination was perhaps inevitable "How many times", he was asked, "were the *mantras* uttered?" "I suppose three times", said he, unconsciously supplying in the same breath the key to such a wonderful feat of memory by adding, "*as is the rule*", and going on to explain "once at the time of bathing it (the body), once at the time of offering *prindas*, and once at the time of *mukhagni* on placing it on the pyre and moving round it in a circle, as is the case with the Brahmins I exactly remember all these happened" (*ibid*, p 369, ll 17-22)

After this, as was to be expected, there were several other witnesses to take up the story of *mantras*,—not, however, those who followed immediately

after, Haran Chandra Chakladar, Nandendra Nath Ghose and Kshetra Mohan Bhattachary, these three having had in fact nothing to say about it, though none of them missed the bathing or the *mukhagn*, or forgot to have seen the face, and the last-named even remembered to have changed the position of the head on the burning pyre to bring it on to the "fire-centre" (Vol 1, p 423, ll 6-8 and p 429, ll 33-35)

Tinkari Mukherjee who came next gave the first support, expressly mentioning the recital of *mantras* (Vol 1, p 435, l 38), but he would not commit himself as to who did it, or how many times it was done the man who was "made to utter" the *mantras* was "probably a Brahmin of that place, might be a clerk" (*ibid*, p 436, ll 6-10), and all that he remembered was that this Brahmin did it at least once before the *mukhagn* when the *pindas* were offered (*ibid*, p 457, ll 25-29) The witness was candid enough to say that it was a custom for the person who did the *mukhagn* to recite the *mantras* (*ibid*, p 436, ll 1-2)

Anthony Morel, the next cremation witness, was similarly able to remember only the fact of the uttering of *mantras* by a Brahmin, which he says took place only a little while before the dead body was placed on the pyre, but he could not give the name of the Brahmin, nor say if he had seen him anywhere before (Vol 2, p 421, l 32—p 422, l 6)

R N Banerjee, giving evidence later, went a little further, speaking not merely of "the chanting of certain *mantras*", but of their being chanted by "Sashi Babu" before "the pyre was set fire to by a young man of the staff belonging to the Kumar" (Vol 3, p 109, ll 3-4)

Satya Prosad Ghosal, D W 101, who came long after, happened, however, to retain only too vivid a recollection of the scenes at the *sasan* he is the man who, it will be remembered, was made by Rai Bahadur Hari Mohan Chandra to share with Sashi Bhusan Banerjee the responsibility for a joint affidavit of cremation (*Ex Z* (202), Vol 1, p 183), but about whose presence at the cremation none of the defendants' previous witnesses appear to have given any indication Satya Prosad Ghosal gave a full recital of the rites, remembering in his examination-in-chief that the man who did the *mukhagn* went round the *chita* seven times, and that as he did so, Sashi Bhusan Banerjee got him to repeat the *mantras* (Vol 14, p 289, ll 6-18) His recollection only improved in cross-examination, bringing it back to his mind that *mantras* were also uttered when the body was bathed and when offerings of *pinda* were made after laying the body on the *chita* (*ibid*, p 297, l 35—p 298, l 22) Sashi Bhusan Banerjee, he remembered, was the only person who read out the *mantras* (*ibid*, p 298, ll 24-26)

Nanda Lal Gargari, D W 112, the next cremation witness, spoke of the smearing of the body with ghee and of the pouring of water over it, but as regards *mantras*, said only in an off-hand manner that some such thing had been done (Vol 14, p 354, ll 27-29)

GRADUAL EVOLUTION OF THE STORY OF MANTRAS

One has only to study the process of *évolution* of this story of *mantras* to be convinced that it is no more than an utter myth, like the performance of the other cremation rites Complete reticence to begin with, in view no doubt of Birendra Chandra Banerjee's and Dr Ashutosh Das Gupta's previous depositions,—then an unguarded reference to *mantras* and casual mention of Sashi Bhusan Banerjee as the priest who uttered them, with inevitable

details following, down to the number of times they were uttered,—first reaction, a natural hesitation to carry on the story,—dropped for a while in consequence, but continued then through later witnesses,—with careful avoidance of uniform elaboration to produce an appearance of genuine recollection,—Sashi Bhusan Banerjee, however, maintained all the time as the sole priest if not expressly named, not displaced by any other,—significant omission of reference to a priest in Birendra's examination-in-chief,—but ready improvisation of joint priests in cross-examination, when surprised by his Ambika Thakur of Sripur fame,—supported only by Dr Das Gupta, Satyendra merely trying to avoid the difficulty, but none too cleverly

I have said enough to show why I find myself wholly unable to accept the defendants' case as to the performance of full Hindu rites at the morning cremation. One or two further illustrations may perhaps be given to prove the utter worthlessness of the evidence given by their witnesses

OTHER CREMATION RITES

Rubbing of ghee and bathing of the body are an important part of the ceremonial at a Hindu cremation, and quite naturally, none of the witnesses could, therefore, afford to forget it. Each, however, tried to embroider his story with such details as he could think of. Thus, Mohendra Nath Banerjee made the dead body "sit" during these operations (*Vol 1, p 340, ll 9-10 and 19-20*), while Tinkari Mukherjee placed it in a slanting position first, when the coat was taken off, a new sacred thread put on and ghee rubbed over, and then made it "sit on the ground" (*Vol 1, p 457, ll 30-33*). Satya Prosad Ghosal, with his wonderful memory for details, gave a more graphic picture. He first said that some people carried the corpse in a "slanting manner" and put it down on the grass, but the body held above the grass, the legs only touching the ground! The shirt was then taken off, and the body anointed with ghee (*Vol 14, p 297, ll 27-30*). Nanda Lal Gargari made the Kumar sit on a *toshak* (mattress) and not on bare ground,—in the same posture as his dead father had been seated, the seat touching the *toshak* and the body supported in that position by somebody holding the back, the body being heavy, also like that of his father, it could not be "held off the ground" (*Vol 14, p 357, ll 8-14*). Then came Birendra Chandra Banerjee, with his smiles, to "non-seat" the body completely

"Q—Mohendra Babu has deposed that the Kumar was smeared, with ghee seated. Is that true?

A—(*Witness smiles*) Is that possible? Could a dead body be seated? Seeing he had died at night—the body had become stiff" (*Vol 15, p 359, ll 1-5*)

FREE PLAY OF IMAGINATION

In my opinion, these are not minor discrepancies such as one might expect to find in truthful evidence, nor are they any guarantee against previous tutoring, for no tutoring can check the voluntary flow of such realistic details, particularly with a certain type of witnesses. They seem, on the other hand, only to betoken the free play of imagination on a topic which gave abundant scope for it, being based on imagination itself

In their anxiety to leave nothing undone in the way of rites and ceremonies, the defendants' witnesses tried their best to avoid the least appearance of a hurried cremation. According to them, without holding them rigidly at all to their timings, the procession started from "Step Aside" at about 9 in the morning, and the funeral started at about 11. Shyamadas Banerjee in fact says they arrived at the *sasan* at about 10, and the buffalo-ghee was sent for at 11-30 or 12 o'clock (*Vol 1, p 260, l 42—p 261, l 1*), and Kanai Ram Mukherjee gives the hour of arrival as about 10 or half past 10 (*Vol 1, p 364, ll 37-38*). As regards the time taken to complete the burning of the body, Kanai Ram Mukherjee puts it down between 4 and 4½ hours (*ibid, p 371, ll 17-19*), after which there followed the washing of the pyre, which itself must have taken a fairly long time, Shyamadas Banerjee saying that at least 10 or 15 pitchers of water had to be brought from the *ghora* for the purpose, and it took 3 to 5 minutes to fill up one pitcher (*Vol 1, p 259, ll 23-26*). Quite consistently, therefore, the witnesses fixed the time of return after 4 or 4-30 P.M., Kalipada Maitra putting the hour of leaving the cremation ground at about 5 P.M. (*Vol 1, p 349, ll 39-40*).

SATYENDRA'S LYING QUIBBLING ABOUT HOUR OF RETURN FROM CREMATION

In his examination-in-chief, Satyendra also fell in with this evidence, stating quite explicitly "We returned from the cremation ground in the evening" (*Vol 16, p 430, l 36*), and admitting this in cross-examination (*ibid, p 502, ll 21-22*). His diary, however, proved a veritable bomb-shell, in which he could not deny (*ibid, p 502, l 32*) he had made the entry in no ambiguous language "Returned at about 2 p.m."! (*Ex 399 (2), Vol 1, p 307, ll 7-8*).

Sitting down to write the diary only a few days after the event, without of course any prophetic realisation at the time of the importance which the question of rites might afterwards assume, it seems to me inconceivable that the man was here making a deliberately fictitious entry as regards the hour of his return from the cremation ground. I have no doubt in my mind that that was the correct hour, and the evidence which has now been given in court advancing the time to evening or afternoon is nothing but manufactured evidence.

There could be no stronger condemnation of this witness than the lying quibbling he indulges in with reference to this entry in his diary.

"Q—If somebody says you returned at 2 P.M. ?

A—That would not be quite correct

Q—You mean quarter past 2?

A—May be 3 or 4 P.M.

3 o'clock I would not call evening but afternoon. Between 3 and 4 P.M. I would call afternoon today. I do not say I could call it evening when I wrote my diary at Jaidebpur—at that time my knowledge of English was not as good as now."

(*Vol 16, p 502, ll 23-30*)

But it was not at Jaidebpur, but in court that he had used the word "evening" in his diary he had mentioned the specific hour of 2 P.M.

His next attempt was to quicken his steps on the return journey from the *sasan* he would have the court believe that he accomplished it in half an hour or 40 minutes' time! (*ibid*, p 539, ll 1-2) As he admitted, it was walking uphill throughout up to the chowrasta. He forgot that one of the defence witnesses Kanan Ram Mukherjee had said that it took about 1½ or 2 hours for the procession to reach the cremation ground from where he had met it, namely, "20 or 25 cubits" away from "Step Aside" (*Vol 1*, p 368, ll 5-8), and that he took about 1½ hour or so in returning to the Cutchery Building from the cremation ground (*ibid*, p 371, ll 31-33)

To keep as near to his diary as possible, Satyendra ultimately wanted to say that the cremation was over at about 2 P.M. (*Vol 1b*, p 539, l 9), but if he returned to "Step Aside" at 2 P.M., it must have been completed by 1 o'clock, which, however, would imply that some extraordinary means must have been adopted to get the body burnt up so quickly. This, of course, he could not admit, and protested, on the other hand "I do not say the cremation was over at 1 o'clock" (*ibid*, p 539, ll 17-19)

A HURRIED CREMATION

It will not do to say, as Mr Chaudhuri now suggests, that Satyendra left the *sasan* directly on completion of the actual cremation, for his own evidence is that he "stayed at the *sasan* right through" (*ibid*, p 502, l 22). In any view of the matter, it seems to me to be wholly impossible to explain away the entry in his diary, which stands in fact staring him as well the other defence witnesses wholly out of countenance. It was a hurried cremation, sure enough, with no useless rites to delay the operations, but, on the other hand, with a plentiful supply of buffalo-ghee, if not of kerosene oil, to feed the fire for an expeditious ending.

"SHAWL" INCIDENT

One important reason for introducing the rites was doubtless to lay the body bare at the *sasan* for everyone to see, but apart from this, the defence witnesses took particular care to stress the fact that they had seen the face uncovered there. This, however, was all false evidence. Not to mention anything else, the very shawl incident to which several of the witnesses refer, is enough to destroy the case that the body was cremated without any covering on the face. There could have been no discussion as to whether the body should be burnt up with the shawl or not, as deposed to by Rajendra Nath Sett among others (*Vol 1*, p 302, ll 4-6 and p 309, ll 15-16), if it had not been placed on the funeral pyre with the shawl on. It will be remembered that Swami Oankarananda in his statement to N K Roy had mentioned the specific incident of Nathu Dome attempting to take away the shawl from the top of the dead body (*Vol II*, p 227, and *Vol 8*, p 100, ll 4-7), and this is probably the reason why the defendants' witnesses were made to refer to it as well,—an unwilling tribute to truth and to the truth of the plaintiff's story, though perhaps without a full realisation of the disastrous effect it had on the case of the defendants.

Among other witnesses besides Rajendra Nath Sett who speak about this particular matter may be mentioned Bijoy Krishna Mukherjee, who says quite clearly that the body was placed upon the pyre after which the ceremony of putting fire to the mouth was done, and "then there was discussion

if the cloth covering the body was to be burnt or given to the Dome" (Vol 1, p 319, l 42—p 320, l 3)

As I have said before, I refuse to believe that the face was exposed at the *sasan*, any more than it was at "Step Aside", merely because the defendants' witnesses all join in saying that they saw it. For one thing, even if it was, this would not be such a striking fact as would inevitably imprint itself on the memory of every one present at the cremation without exception. The very positiveness with which the witnesses make their statements seems to me to condemn their evidence.

HARAN CHANDRA CHAKLADAR

It is not necessary to deal with all such witnesses, but I might perhaps touch on the evidence of one of them, Professor Haran Chandra Chakladar (Vol 1, pp 376-400), to whom and to whose introduction into the witness box I have had occasion already to refer at some length in connection with the Lindsay enquiry, he being a witness on whom Mr Chaudhuri probably relies as strongly as did Mr Lindsay, who thought in fact that "he was the sort of person whose evidence would be believed throughout Bengal whatever he said" (Vol 2, p 140, ll 20-21)—though one does not know on whose testimony Lindsay had come to form this extraordinary estimate (*ibid*, p 149, ll 16-19)—not apparently through Satyendra, if one is to believe him, for he stoutly disavowed any acquaintance with this University Lecturer, having in fact never even heard of his name before he happened to go along to his house with Lindsay to record his statement (Vol 16, p. 540, ll 13-14 and ll 19-21).

By his evidence, the witness gives the "fullest support to the defendants' case regarding the morning cremation. He was one of the Brahmans who went over from the Sanitarium (Vol 1, p 376, ll 27-32), and helped to carry the dead body (*ibid*, p 377, l 34). He speaks of "the utmost publicity" with which the procession was taken along, scattering pice on the way as it proceeded (*ibid*, p 377, ll 8-9 and l 26), and speaks also of the bathing of the body and the *mukhagni* at the *sasan* (*ibid*, p 377, ll 37-39). He saw the dead body before it was taken to the cremation ground, saw it again after it was taken there, both at the time of bathing and at the time of *mukhagni*, recognising it to be that of the second Kumar of Bhowal (*ibid*, p 378, ll 1-10). He was present at the condolence meeting at the Sanitarium, which he says was largely attended and at which he himself spoke (*ibid*, p 378, ll 15-16 and ll 20-22).

PRESENT EVIDENCE AND PREVIOUS STATEMENT TO LINDSAY COMPARED

If Lindsay's record of his interview with him (*Ex Z*(359), Vol II, p 268) can be accepted as correct,—and the defendants do not suggest it is not,—Chakladar's present evidence is indeed a remarkable improvement upon the statement he then gave, for, according to Lindsay, "Professor Chakladar went to the house and saw the body lying under a sheet", and "saw the Kumar's face when the fire was applied to the dead body", the plain meaning of which, as it seems to me, is and can only be that he saw the face for the first time at the *sasan* at the time of *mukhagni*.

With a subtlety worthy of a medieval school-man, this erudite post-graduate lecturer on Ancient Indian History and Anthropology (*Vol 1, p 379, l 23*) was, however, very keen to make out in cross-examination that though he said he had seen the face when the body was on the pyre, he did not say that he had seen it then "only" (*ibid, p 395, ll 11-12 and l 28*) He could not help admitting all the same that when he saw the dead body at the house, being brought out "from within", as he said, it was at the time "in lying condition, covered with a piece of cloth",—"covered with a *chadar*", as he repeated (*ibid, p 393, ll 6-7, 10-11 and l 29*)

I do not believe that he had seen the face anywhere. He would certainly not see it on the pyre, if the body was laid on, face downwards. That is probably why he was anxious to create for himself now an additional opportunity of having seen the face, namely, at the time the body was bathed, and he went the length of suggesting that "most probably" he had "stated about bathing before Mr Landsay"! (*ibid, p 395, ll 7-8*) It is curious, however, that though his recollection was clear about having seen the face during the alleged bathing, it should have wholly failed him as to who had done the bathing (*ibid, p 394, ll 31-32*), or whether it had been done "in a lying or a sitting posture" (*ibid, p 395, l 4*)

I need hardly repeat what I have pointed out before that according to the witness bathing as well as *mukhagni* was an inevitable feature of every cremation he had attended, and in giving a description of the second Kumar's cremation, it is not at all surprising, therefore, that he should mention bathing as part of the rites, whether in fact he had been there to see it or not

The witness admits having got a copy of his statement to Landsay from a nephew of his, an Alipore pleader, before he came to give his deposition in this case (*ibid, p 392, ll 25-29*), but in re-examination he invented the ridiculous fiction, which is really not evidence at all, that his nephew told him that somebody on behalf of the plaintiff had given it to him to show it to the witness (*ibid, p 398, ll 19-25*), the nephew who was said to be residing with him in his house (*ibid, p 399, ll 5-6*) not having been examined

AMAZING LACK OF STRAIGHTFORWARDNESS

Haran Chandra Chakladar is a witness who, for a man ostensibly holding a responsible position, showed from the beginning an amazing lack of straightforwardness which seems to me to make the whole of his evidence suspect. According to Landsay's record of his interview with him, Chakladar "did not wish to be called in court so he had not given a written statement before" (*Vol II, p 266, ll 13-14*), which suggests, first, that Landsay had sent him a questionnaire, but he would not reply, and secondly, that on Landsay enquiring about the reason, he averred his disinclination to come to court. Landsay surmised that as "an old man and a scholar" he did not like to be "bothered with these things" (*Vol 2, p 155, ll 12-14*), though one does not know how, a scholar as he might have been, he was an "old man" at 46! Chakladar in his evidence, however, totally denied that he had been asked for any statement before his interview with Landsay (*Vol 1, p 395, ll 29-33*). He sought to convey the idea that he merely refused to make a "formal statement" before him (*ibid, p 380, ll 3-6*), understanding by "formal statement" that Landsay would put him questions, and he would

have to reply to them one after another, and then sign the document (*ibid*, p 380, ll 20-23) All the same, he was not in a position to deny that he might have told Lindsay that he was "all along against giving deposition in court", because forsooth he was "afraid of coming to court"! (*ibid*, p 384, ll 11-13)

This timidity to face the court seems, however, to have somehow vanished, when he had to find an excuse for his unwillingness to make the "formal statement" he must then of course have said to Lindsay that if he had to make such statement, he would, if necessary, make it in court! (*ibid*, p 380, ll 8-9 and p 384, ll 13-14)

PRETENCE OF BONA-FIDES

The witness tried no doubt to keep up the pretence of *bona fides* as long as he could, but had very soon to give himself away, when pressed for the reason why he would not give a signed statement to Lindsay at the personal interview "What objection can you have to that?" (*ibid*, p 380, l 24) Out came the truth in an unguarded moment "I did not like then to be bound down by that statement"! (*ibid*, p 380, l 25) A lot of explanations followed after this, some "golmal" (trouble) might arise in future the matter might get publicity the other side might "use force" on him in future and "oppress" him! (*ibid*, p 380, ll 27-31) One wonders if to save himself from such "oppression" he was keeping himself free to make any statement whatever in future as he might find it to his interest to make!

Mr Chaudhuri solemnly invited the court to accept this as a serious explanation, and actually called attention to the Murzapur riot which took place on the 10th June, 1921 (*Vol 18*, p 113, ll 43-44), and to the murder of Mukunda Gum which followed on the 24th September of that year—after Chakladar's statement, he it noted—(*ibid*, p 116, ll 30-33), as if these occurrences had deterred a single other witness from making a statement, and as if the making of a "formal" statement would make all the difference!

Chakladar was doubtless at Darjeeling at the material time, staying at the Sanitarium, as stated by Professor S N Maatra and other witnesses of the Maatra group, and this was perhaps his only connection with the supposed cremation of the second Kumar of Bhowal on the morning of the 9th May!

EXTRAORDINARY INTEREST IN SECOND KUMAR AT DARJEELING

Chakladar's story of being called from the Sanitarium in the morning (*Vol 1*, p 376, ll 27-32)—how a man from the Kumar's house came to one Nibaran Mukherjee to give him the news of death, and how this "Nibaran Babu", who was a fellow boarder of Chakladar occupying the next room to his at the Sanitarium, informed him in turn and took him along as a Brahmin to help in the cremation—agrees with nobody's version, and is in fact contradictory to the defendants' own case that a messenger came only once to the Sanitarium, and his further statement that he and his companion stopped on the way at the Cutchery Building to give information to the Secretariat clerks (*ibid*, p 386, ll 21-22) is equally a departure from their other evidence, being perhaps a confused effort to keep in line with the version of Rajendra Nath Sett

There was probably one Nibaran Mukherjee at the Sanitarium at the time, as is spoken to by Professor Maatra (*Vol 8*, p 12, ll 27-28), but whether he was the "Nibaran Babu" of Chakladar is not at all clear, this person

being admittedly dead,—a fact which the learned judge notes (*Vol 18, p 392, l 1*), but only to excite Mr Chaudhuri's anger as conveying an unworthy suggestion against the witness. With due emphasis counsel pointed out that Chakladar himself stated that he did not know whether Nibaran Babu was dead or alive (*Vol 1, p 376, ll 33-34*), but it is rather significant the witness vouchsafed the information in his examination-in-chief. The fact remains that none of the defendants' commission witnesses mention either Chakladar or his "Nibaran Babu" as among those whom they saw at "Step Aside" or at the *sasan*. Neither does Chakladar appear to have mentioned Nibaran Babu to Lindsay, though according to Mr Chaudhuri, questionnaire or no questionnaire, every witness must have been asked if there were other persons present either at the time of death or in the procession or at the cremation. Chakladar, of course, never met this Nibaran Babu ever afterwards. He merely knew that he lived in the district of Dacca, and did not remember the name of the village (*ibid, p 376, l 35—p 377, l 1*). He had picked up his acquaintance only at Darjeeling (*ibid, p 388, ll 16-17*).

Nibaran Babu must apparently have felt greatly interested in the second Kumar at Darjeeling, and infected his new friend with some of his interest as well,—though this is a fact not deposed to by Satyendra or any of the other members of the Kumar's *entourage*. For, it is from Nibaran Babu that Chakladar is supposed to have heard, and "heard repeatedly" about the Kumar's illness even "5 or 7 days" before the latter's death (*ibid, p 389, ll 10-12, 19-28 and 28-29*) and not only this, but he heard that the illness was "pain in the abdomen"—"colic" (*ibid, p 389, l 31 and p 390, l 13*). "thus much" he remembered, however, that the condition of the Kumar "was not very serious" (*ibid, p 390, ll 10-11*). In point of fact he and Nibaran Babu felt impelled to go to see the Kumar one day (*ibid, p 389, l 34*). They met him sitting "in the outer parlour", but though there was no question of "coming to court", a strange shyness still seems to have overcome this timid man, and during the half-hour he was there, he no talk with the Kumar! (*ibid, p 390, ll 15-16, 21-22 and 29-30*). Sure enough, however, he saw him,—"probably" "for the first time" "in that very place" (*ibid, p 391, l 4*), for, unless he did so, how could he, even with his academic vision, recognise the face afterwards on the pyre, if not on the *khatia* and during the bathing?

Chakladar's interest in the Kumar did not end with the latter's death, for, he duly attended the condolence meeting at the Sanitarium, and also "spoke something" (*ibid, p 378, ll 15-21*), but curiously enough,—even if his name might have been left out in the "list of persons present" (*Ex Z(118), Vol I, pp 462-463*),—it was not to be found in the record of the proceedings of the meeting which happened to give the name of all the speakers (*Ex Z(115), ibid, pp 451-454*).

I am not at all surprised that the learned judge refused to believe this witness, and so do I without the slightest hesitation.

PRETENDED DETACHMENT OF DEFENCE WITNESSES FROM SATYENDRA

It is necessary only to emphasize a point I have dealt with at some length earlier in my judgment—the ignorance which the witness and Satyendra pretended of each other. This detachment from Satyendra is in fact a remarkable feature of the evidence given by the defendants' witnesses,

and it is both interesting and instructive to cull together a few of the references

Jagat Mohini —

"Q—Do you know the brother-in-law of the Kumar?"

A—I went there only for a day I did not know such things as to who was the brother-in-law or who was a relation I have no acquaintance with the Kumar's brother-in-law I am not even aware as to who the brother-in-law is" (*Vol 1, p 288, ll 9-13*)
 "I have not heard the name of Satyendra Banerjee" (*ibid, p 289, ll 33-34*)

Kalpada Mastra. —

"I had no acquaintance with Satyendra Nath Banerjee, but I saw him at the time of burning the dead body in the cremation ground Regarding this matter up to this time I had no talk either with Satyen Babu or with Rai Bahadur or with Pankaj Babu" (*Vol 1, p 355, ll 7-10*)

Haran Chandra Chakladar —

"Q—Did you ever meet with Satyendra Babu in your life except on these two occasions, that is, on the occasion of Kumar's death and in company with Mr Lindsay?"

A—No, I did not meet him any more" (*Vol 1, p 379, ll 12-15*)

"I did not think at that time that Satya Babu was interested in any way in that enquiry (Volunteers) I came to understand afterwards that as the Kumar's wife admitted Kumar's death to be true, Satya Babu was also on that side" (*ibid, p 381, ll 33-36*)

"I do not know whether Satya Babu used to stay at Kumar's wife's house I had no talk with Satya Babu on any other day except on the day of the Kumar's death On the day Mr Lindsay came, he came and informed me I had no conversation with him The day on which Mr Lindsay came, Satyendra Babu did not introduce himself I recognised him at the very sight" (*ibid, p 385, ll 28-31*)

Nalendra Nath Ghose —

"I do not know Satyendra Banerjee I cannot tell the name or the particulars of one of his men who one day made the Kumar of Bhowal known to me I do not know him even It was he who said that he was the Secretary to the Kumar or some such thing" (*Vol 1, p 419, ll 15-18*)

R N Banerjee —

"I do not remember the name of Satyendra Nath Banerjee, and I cannot connect anybody whom I know" (*Vol 3, p 113, ll 2-3*)

"I do not know the sala of the Kumar I have never seen him probably" (*ibid, p 114, ll 12-13*)

Narendra Nath Mukherjee, D W 66 —

"I do not know Rai Bahadur Satyendra Banerjee I never saw him. I see his name now in the papers" (*Vol 13, p 193, ll 24-25*)

Surendra Mohan Chanda, D W 69 —

"I did not hear the name of *Satyendra Babu*, Kumar's brother-in-law, or see him

To Court I saw the name in the papers I saw it 12 years after the second Kumar's death" (Vol 13, p 222, ll 14-17)

Satya Prosad Ghosal, D W 101 —

"I never heard the name *Satya Banerjee*

Q—*Satyendra Nath Banerjee*, Rai Bahadur?

A—I heard the name not then, but after the arrival of the *sannyasi* I heard that he was the brother of the *Rani* and was at *Darjeeling* then" (Vol 14, p 297, ll 8-11)

Prish Chandra Roy, D W 103 —

"I did not know Mr *S N Banerjee* or *Rai Bahadur Satyendra Banerjee* then I know him now I mean I have read of him in the papers, I don't know him" (Vol 14, p 315, ll 26-28)

Nanda Gopal Gargari, D W 112 —

"I understood that the *Rani* was there, but did not hear of her brother No body was pointed out to me that day as the Kumar's *sala* I did not know even now whether the Kumar's *sala* was there" (Vol 14, p 362, ll 6-8)

Panchanan Maitha, D W 113 —

"I do not know *Satyendra Banerjee* Nor if he ever read at *Bali* I saw his name only in papers—did not otherwise hear it This was 1½ or 2 years ago when the suit began I read in the papers that a *sannyasi* calling himself the Kumar was prosecuting the case I read *Satyen Banerjee's* name in that connection

To Court I never saw *Satyendra Banerjee* I do not know that he has any connection with this case I saw his name in the papers once again I probably saw that the defendant (*Bibhabati*) is related to him" (Vol 14, p 366, ll 3-14)

All these protestations are to my mind nothing but an elaborate make-believe, and one wonders if the witnesses themselves expected that they could thereby deceive anybody as to the true character of their evidence, which is that of partisan witnesses from beginning to end

FINAL CONCLUSION ON MORNING CREMATION

I believe I have discussed the evidence of the morning cremation at sufficient length, giving the fullest consideration to Mr *Chaudhuri's* arguments on all material points, and I have no hesitation in recording my entire concurrence with the trial judge's conclusion that the body which was taken out for cremation and cremated on this occasion was not that of the second Kumar of Bhowal

It is perhaps necessary to add that in arriving at this result, I have not paid the slightest regard to the question of identity or to the learned judge's findings thereon, but have proceeded solely and wholly on the evidence touching the cremation itself and the proceedings connected therewith The

plaintiff may not have been able to give *direct* evidence regarding the substitution of another body,—in my opinion, as I have explained before, he was not called upon to do so, whatever his legal advisers may have thought in the commission stage of the suit when they put the Pemguchia story to Lindsay in cross-examination (*Vol 2, p 178, ll 29-32*),—but there can be no doubt whatever that the defendants have signally failed to substantiate the case which they set out to make, namely, that it was the Kumar's body which had been actually burnt in the morning cremation

To show that the Kumar's body escaped cremation on the night of the 8th May, and that the body cremated on the day following was not the Kumar's, will not, however, carry the plaintiff the whole of the way he has to travel before he can establish his case. He will have yet to prove that the body which was missed from the cremation ground on the 8th night was alive and thus takes us to the next topic, that of Rescue

7 ALLEGED RESCUE BY SANNYASIS

The story of rescue is quite an important chapter in the plaintiff's case, and the evidence of it comes mainly from one of the rescuing sadhus, Baba Darsan Das Naga, *P W 991 (Vol 11, pp 378-422)*, or Darsan Das, to give him the shorter name by which he has been referred to in these proceedings, confirming the plaintiff in respect of such particulars as the latter could be expected to give (*P W 10, Vol 4, pp 94-181*)

The witness not only describes the actual rescue, but narrates the plaintiff's history from then onwards to the moment of his appearance at Buckland Bund in Dacca, and if his evidence can be accepted, there can be no doubt that this will by itself be almost enough to prove the plaintiff's identity as the second Kumar. The account he gives really establishes an unbroken chain of continuity from Darjeeling to Dacca, the man rescued from Darjeeling *sasan* in May, 1909, being the very man who turned up at Buckland Bund in 1921, and it corroborates in all essential particulars the account which the plaintiff has himself given of his wanderings with the sadhus since he left Darjeeling in their company. All this evidence, it is to be noticed, is practically one-sided and stands unchallenged in cross-examination

It is perhaps not a violent assumption to make that the body which is said to have been rescued by Darsan Das and his companions was the same as had been brought to the *sasan* that night and was afterwards missed by the cremation party from "Step Aside"

The learned judge in the court below, if I follow him aright, is not prepared to accept the evidence of rescue as proof of identity, but identity being otherwise established, he sees no reason why it should not be believed. "Nobody", he says, "will accept this evidence, or accept it as proof of identity, if it were not otherwise proved, but granted the identity, there would be no reason to reject it" (*Vol 18, p 394, ll 18-21*). Or, as he puts it otherwise "His (Darsan Das') account reads like a fairy-tale, and if the plaintiff needed it to establish his identity, he would fail, for it can be no more found on this testimony than it can be found upon his testimony that he is the Kumar" (*ibid*, *p 396, ll 22-25*)

In my opinion, the credibility of Darsan Das need not rest on prior proof of identity at all. If as the trial judge holds, the account this witness gives is "clear and consistent, and unshaken by cross-examination", (*ibid*,

p 394, ll 33-34), I see no reason why it should be supposed to possess this character only on the condition postulated by him "given the identity, otherwise proved" (*ibid*, ll 32-33)

AMAZING STORY OF RESCUE BY DARSAN DAS

It is no doubt an amazing story, almost a fantastic tale, which this witness relates, but this by itself seems to me a circumstance which, if anything, ought to tell in favour of its truthfulness, rather than against it it should in fact be regarded as too strange to be a fiction

The learned judge has himself expressed his appreciation of the witness in no uncertain terms. As he points out, the man denies that he had been to Darjeeling after the incident he was speaking of (*Vol 11, p 398, l 23*),—there being nothing on the defendants' side to show the contrary,—and he seemed also to be incapable of grasping a map (*Vol 18, p 396, ll 21-22*), and yet, to quote the words of the judge, the account he gives only "gets richer and richer in cross-examination, breaking down nowhere, not even on points of topography in so difficult a part of Darjeeling, changed out of recognition since 1912 when the new Sudhir Kumari Road was opened, all trace of the old *sasan* gone" (*ibid*, p 396, ll 17-21). Even if he had been taken to the spot and tutored by somebody, says the learned judge, he would have expected such a witness to break down. But Darsan Das did not. On the other hand "he stood cool and collected in the box and gave his account with the air of a man speaking from memory, and the memory of an illiterate man for detail" (*ibid*, p 394, ll 36-40).

Such being the opinion of the trial court itself about this witness, it seems difficult to follow why his evidence should not have an independent value of its own, apart from any reference to the question of identity. The evidence will certainly bear scrutiny on its own merits.

Unable to shake the witness directly, Mr Chaudhuri yet advanced a number of grounds before us why his story should be rejected outright as "pure invention", for on his argument there could not be any question of a mistake on the part of the witness.

The story is given in elaborate detail, so far as the actual rescue, up to the time of the sadhus departing from Darjeeling with the plaintiff, is concerned (*Vol 11, p 381, l 37—p 386, l 27*), and need not be recapitulated at length. The learned judge has set out a great part of it in his judgment in the witness' own words (*Vol 18, p 394, l 41—p 396, l 34*). There was a long cross-examination of the witness on the matter, but he stood it remarkably well (*Vol 11, p 400, l 15—p 412, l 15*).

THE STORY IN BRIEF THE DARJEELING PART

Briefly, the story is that Darsan Das and three other sadhus whose names he gives, Dharam Das, Pritam Das and Lok Das, were sitting one evening in a secluded shelter near about the old *sasan*, which was some sort of a cave formed of big boulders, just enough to hold 4 persons. Their attention was suddenly attracted by cries of "*Haribol*", "*Haribol*", these being the usual cries uttered during a Hindu funeral procession. One of them looked out, and saw a crowd of people with lanterns flashing on the *sasan*. A strong wind was blowing at the time, and the sky was also

overcast. Soon they ceased to hear the cries, and Darsan Das stepped out to see what had happened. There was no trace of the crowd. The wind had meanwhile dropped, but not the rain, and he heard a succession of weird sounds, which apparently excited his curiosity. He and Lok Das then went up to the spot from which the sounds had been proceeding, and found a man lying on a *manja* (literally, a raised platform, and meaning the *khaha*). Lok Das pushed back the top sheet which covered the body after untying it, and also took off the cloth underneath which was wrapped round the man. Then, putting his hand over the nose, he perceived signs of breathing, and cried out that the man was living. Darsan Das at once went back to fetch his other two companions. Lifting the body from the *manja*, the sadhus then carried this man in their arms to their *guha* or cave, where they took off the wet clothes and put a dry cloth and blanket round him.

"BLANKET FACTORY"

They did not, however, stop in this shelter, as there was hardly room for them here, and so they took him to a "*ghar*" or hut further down-hill, being a four-roomed hut with an out-house, which is spoken of by P.W. 994, Gurja Bhushan Roy (Vol. 11, p. 433, ll. 35-37) and described by him as a *karkhana* (workshop). Mr. Chaudhuri calls it a "blanket factory", but it means no more than that in one of the rooms were a few implements for the weaving of coarse blankets or *puttoos*, another room being used for the making of *kavnas* or indigenous drugs, while the other two rooms were living quarters, one for the *chankidar* or care-taker of the place, and the other for a man named Sris Chandra Gupta, P.W. 993, who used to look after the preparation of the medicines. The out-house which stood about 20 cubits away was kept as a godown.

The sadhus came to this "*ghar*", and took shelter in the out-house after removing the lock with their *chumta* or tongs. They laid the sick man on a *khaha* which they found inside. Next morning they were challenged, apparently by the *chankidar*, but were later visited by a Babu, meaning P.W. 994, Gurja Bhushan Roy referred to above, who turned out to be more friendly, and actually gave them a blanket for their ailing companion. Meanwhile, they had got a barber to come and shave the man's head for local application of some stuff which they prepared.

HILL-MAN'S HUT

As people started coming, the sadhus did not stop at this place long, but removed to another hut further down-hill belonging to an old hill-man who lived close by with his wife. Here also they were lucky enough to find a *manja* and they carried their new friend to it, still unconscious. Two or three days later he happened to open his eyes, and uttered the words (in Bengali) "Where am I?" The sadhus, however, admonished him to keep quiet. In this way they spent 14 or 15 days in this hut, during which the man slowly recovered under their ministrations, and the whole party finally left Darjeeling by train.

Darsan Das says that during this period they neither made any enquiries nor told anybody about the man they had rescued. They were "afraid of a row and of having to give explanations", and that is why they kept the

matter a secret (*Vol 11, p 387, ll 7-16*) Neither did it occur to them at the time of rescue that the friends and relatives who had brought the man to the *sasan* for cremation would be only too glad to see him alive they on their part were glad to have got "a dead man living"—"it was a *satbastu* (lit a blessed thing) and had to be cherished tenderly" (*ibid, p 404, l 22—p 405, l 16*), as he said quite candidly, little realising that he would thereby only make himself an object of Mr Chaudhuri's sneer, as if he meant to say anything more than that it rejoiced them to think that it had been given to them to save a life which had been given up for lost

At Darjeeling, the man, after he regained his consciousness, talked very little, and that not intelligibly his speech was also "impeded", as if through some physical obstruction His behaviour there, and even for a long time after leaving Darjeeling, was like that of a man bereft of understanding—a "*boda*", as the witness says, not a dumb or speechless person, as the word literally means, but one with a vacant mind, a nincompoop, as it were

PLAINTIFF'S OWN ACCOUNT

It is interesting to recall here the account which the plaintiff himself gives of this period

"What happened after I became unconscious I do not know I returned to consciousness I found myself amid hills and jungles I was lying on a *khata* That was on firm ground and the only house was a tin *chhapra* There were four sannyasis there besides myself I asked, "where am I?" The sannyasis said - "You were weak—don't talk" They said that in Hindi I could understand Hindi then I had picked it up, as in my house were durwans, syces, mahouts, who talked Hindi As the sannyasis asked me to keep quiet, I kept quiet

"I was at the same place for 15 or 16 days During the period I had no talk with the sannyasis I do not remember what happened after that I left after that I went with the four sannyasis We went on foot and also by train The next thing I remember is that I was at Benares—at Asighat, Benares" (*Vol 4, p 101, ll 27-39*)

He afterwards gave the names of the sadhus as Darsan Das, Pritam Das and Lok Das, besides Dharam Das who became his Guru (*ibid, p 174, ll 13-14*)

It is worth while to set out the cross-examination in full —

"I asked—it came out of my mouth—"Ami kothay elam" (where have I come?)

I was not conscious that the sannyasis were different from me I saw the *tata* (matted hair) and that they were naked, and the *bhasma* (ashes) on their body, but I had no consciousness of any distinction between them and me I had no consciousness as to whether I was a Bengalee, or Punjabi or English at that moment I lay on a *khata* under a *chhapra* I had no memory of any different kind of bed or bedstead Nor if I was a *Bhadralogue* or a peasant Nor of a house-holder or *Banagi* nor of a *Yogi* or *Bhogi* Nor if my previous life was happy or miserable No consciousness at all of my past—like a baby just born I can't recall if I knew Bengali or Hindi—only the sannyasis spoke in

Hindi and I understood, and I understood they were Hindusthanis
It was as if I was born anew I did not know if I was a man
or a ghost

Q—You remembered your Bengali?

A—No

Q—You had consciousness you knew Bengali?

A—I had not

I had no consciousness of being surrounded by hills or whether
I was in a sea I could not recognise trees, nor sky, nor cloud

Q—Whether it was sky or *paial*?

A—No

I started learning things like a child This was my condition
till I reached Benares I don't remember, no consciousness, if
I got into a train Or how I went to Benares Whether by train
or on foot Nor if I went by the Darjeeling Railway The
sannyasis began to call me by what name I have no consciousness

Q—They called you like a man or a dog?

A—Don't know

They did not give me a name Can't say how they called me
I did not see any Bhutia or hillman on my way, nor could I
know him if I did I could not know cattle, such as cow, calf,
ram, goat I could not know articles of food

Q—Supposing the sannyasis gave you bread, would you distinguish
it from rice?

A—No

I forgot the meanings of words, Bengali and English I had
no consciousness at all—no knowledge (When interpreted says
"I had ordinary knowledge of things after Asghat—only I did
not know my home and people")" (Vol 4, p 158, l 24—p 159,
l 28)

Leaving aside for the moment the question of the plaintiff's mental
condition after the rescue, as depicted by Darsan Das and the plaintiff himself
—of "loss of memory", as it has been described, I am not at all satisfied
that Mr Chaudhuri has been able to make a successful attack on the story
of rescue itself This story, it ought to be added, has been corroborated in
some material particulars by three other witnesses who were examined next
after Darsan Das,—P W 992, Bejoy Krishna Gupta (Vol 11, pp 424-427),
P W 993, Srisch Chandra Gupta (*ibid*, pp 428-432) and P W 994, Guriya
Bhusan Roy (*ibid*, pp 433-442), who speak about the "blanket factory" and
the incidents there

MR CHAUDHURI'S COMMENTS

Mr Chaudhuri started the theory that Darsan Das, who on his evidence
was also called Gopal Das, was got hold of some time in November, 1934,
and that corroborative evidence was manufactured after he was secured, in
order to prop him up, this being the evidence not only of the three witnesses

just mentioned, but also of others, such as Mati Lal Ganguli (on commission) (*Vol 11, pp 338-347*), who, it is said, was made to introduce the story of a cave during X'mas, 1934 (*ibid, p 339, ll 24-31*) to prepare the ground for Darsan Das who had been served with summons on the 20th December, 1934, but was not put into the box till the 9th January following

All this is pure imagination Counsel sought to support it by a suggestion, equally imaginary, that the plaintiff's original case was that of a *single* rescuing sadhu, his Gurn Dharam Das, but that as the latter failed him, thus eliminating the only direct evidence of the alleged rescue, the number was thereafter slyly raised to more than one in order to let in a second sadhu, if possible, for the purpose

EARLIER CASE OF A SINGLE RESCUING SADHU

In the first place, it is wholly wrong to say that Dharam Das had failed the plaintiff at all I have had occasion already fully to deal with the circumstances under which the plaintiff had him brought down to Dacca, and how he was turned away by the agents of the defendants Secondly, it is not a fact that the plaintiff had ever made the case of a single rescuing sadhu The only basis for this suggestion seems to be Lindsay's record of his interview with the plaintiff on the 29th May, 1921, when the latter is supposed to have told Lindsay "that he recovered his senses in the jungle, in the hills, in the presence of *one* sadhu who has since been his Guru" (*Ex Z (358), Vol II, p 314, ll 1-3*), but as I have also explained before at some length, it is impossible to attach any importance to Lindsay's memorandum as either a correct or a complete record Even the rumour referred to in Ram Satyabhama's letter to the Maharajadhiraj of Burdwan spoke of an ascetic who had come "with his followers" and taken away the second Kumar from the *sasan* (*Ex Z (33), Vol II, p 175, ll 30-31*) The defendants cannot point to any evidence that it was given out at Jaidebpur at any stage after the plaintiff's advent that the rescue had been effected by only one sadhu That was never the plaintiff's story, though, significantly enough, this was imputed to him in the official "story of the sadhu" (*Ex 443, Vol II, p 239, ll 29-32*) Mr Chaudhuri referred to paragraph 7 of the memorial to the Board of Revenue, *Ex J*, in which it is stated that the plaintiff's body was picked up from the cremation ground and carried away by "some *sannyashis*" (in the singular), but this is obviously a typographical mistake, and in any case cannot indicate a single rescuing sadhu, seeing that in the very same sentence occurs the statement that when the memorialist "regained consciousness some days after, he found himself lying in a hut surrounded by *sannyasis*" (in the plural) (*Vol III, p 93, ll 15-18*) Further on, in the same paragraph reference is made to "one of the Naga *sannyasis*" and "his new associates" (*ibid, ll 21 and 25-26*) The plaintiff's case in the plaint also was definitely that of more than one sadhu (*Vol I, p 120, ll 30-32*), and this was not challenged in cross-examination

BEHATED CALLING OF DARSAN DAS AS A WITNESS

Equally flimsy are the grounds for Mr Chaudhuri's suggestion about Darsan Das having been secured by the plaintiff some time in November, 1934 Darsan Das in his evidence gives a full account of his movements ever

since he was initiated by his *guru* Bawa Harnam Das at the age of 20, which would be in the year 1908, seeing that he was 47 at the time of giving evidence (Vol 11, p 378, l 18 and p 379, l 5) The account remains wholly unshaken in cross-examination. He says that after the *Brahmachari*,—that is how he designated the plaintiff,—had left the company of the sadhus at Braha Chhatra (in Nepal), the witness met him for the first time "about a year ago", that is to say, in or about the month of January, 1934 (*ibid*, p 393, ll 27-28), and there is no reason whatever for not accepting this statement. The plaintiff asked him then to depose on his behalf (*ibid*, p 393, l 40), but he explains why he did not give his evidence until about a year later. He went off to Chandranath at the time to attend the *Shivarathri* fair, and from there he proceeded to Brahmagaoon. He then thought he should go to his *Guru* and get his permission before he deposed, and so he did. He met his *Guru* at Nankhana Sahib in Bhadra, i.e., August, 1934, and did not return till about Xmas of that year (*ibid*, p 349, ll 4-18) he says he "arrived at Dacca when the court was closed" (*ibid*, p 394, ll 15-16 and p 416, ll 19-20).

Mr Chaudhuri seizes upon this last statement to show that Darsan Das must have been giving false evidence, seeing that he was actually served with summons at Dacca on the 20th December, 1934, when the court had not yet closed for Christmas vacation (see *Ex Z* (70), Vol III, p 329 read with copy of the summons, *App Vol pp* 258-259), but it seems to me that the witness was not pretending to give the exact date of his arrival at Dacca, and there would be no sense in his putting forward the date falsely. Darsan Das must have returned before the Christmas vacation: there is actually a petition filed by the plaintiff on the 22nd December, 1934, asking for permission to examine a few witnesses before closing his case, and one such witness expressly indicated in the schedule appended to the petition is "one of the sannyasis who carried the second Kumar from the *sasan* to the shed where he was nursed" (Vol 11, p 297, ll 13-14).

The fact that Darsan Das, though a material witness, was not produced until at a comparatively late stage seems to me only to indicate that he was the genuine man: if the plaintiff was minded to put a fictitious rescuing sadhu in the box he could have easily done it much earlier. He, however, preferred to wait till the real man was forthcoming. The plaintiff could obviously gain nothing by producing a false witness at a late stage. As has been shown above, he had already given out his case in his own evidence long before, so far of course as he could do from his conscious experience, and that case, be it noted, coming as it did from one who proved himself none too clever a witness in the box, Mr Chaudhuri with all his skill could not shake in the least.

As for the supposed corroboration of Darsan Das by other witnesses in anticipation, this is said to have been attempted mainly in respect of two particulars, the existence of a cave below the cremation ground and the presence of *naga sannyasis* at Darjeeling in May, 1909. The suggestion that Darsan Das stood in need of such corroboration seems to me to be ridiculous. If the story he told was not otherwise acceptable, it was not likely to gain in strength or compel conviction merely because one or two other witnesses came and spoke about there being a cave in the hill-side of Darjeeling or to their having seen wandering sadhus there,—neither of these being after all a very improbable fact.

Mr Chaudhuri refers to P W Mati Lal Ganguli as having supplied the necessary corroboration regarding the cave, but all that this witness said

was "At that time the place below the cremation ground was hilly, jungly and *sishnu*, that is, covered with stones one upon another. There were sometimes open spaces in the said rocks and sometimes there were not" (Vol 11, p 339, ll 18-27). If this was really evidence of cave-like contraptions of stones, which did not actually exist, one does not know why learned counsel did not direct any cross-examination to the point.

As for the naga sannyasis, the corroboration is said to have come from P W 968, Chandra Singh (Vol 11, p 88, ll 5-11 and p 92, l 33—p 93, l 3) and P W 983, Santa Bir Singh (Vol 11, p 259, ll 29-35 and p 262, ll 20-24), but P W 967, Ram Sing Subha, already spoke of these sadhus (Vol 11, p 68, ll 3-13), and the plaintiff himself had referred to the naga sannyasis long before any of these witnesses (Vol 4, p 170, ll 23-25). It does not appear that the presence of such sadhus at Darjeeling was seriously disputed at any stage of the case.

I do not think there is really any substance in the point raised by Mr Chaudhuri regarding the belated calling of Darsan Das as a witness: the suggestion comes with ill grace from those who put forward a bogus Dharam Das (D W 327, Vol 16, pp 51-88) in the box without notice, as pointed out by the learned judge (Vol 18, p 406, ll 4-6, see also order No 1444, dated 11-2-36, Vol 1, p 109, ll 11-23).

GENUINENESS OF IDENTITY ADMITTED BY DEFENCE WITNESSES

There can hardly be any reason to doubt that the plaintiff's witness Darsan Das was the real person he purported to be, and the suggestion that he was an impostor recoils with amusing effect on those by whom it is made. According to Mr Chaudhuri, he was a sadhu of the name of Gopal Das who was well-known in Bengal by that name, but was made to personate Darsan Das, one of the supposed rescuing sannyasis named by the plaintiff. It is curious, however, that the account which the witness gave of himself, his antecedents, his *guru* and his fellow-disciples came to be "quietly adopted", as the learned judge says (Vol 18, p 398, ll 9-15), by the two persons who were afterwards put up by the defendants to give evidence on their behalf as Bawa Dharam Das, *chela* of Bawa Harnam Das, and Bawa Harnam Das, *guru* of Bawa Dharam Das (D W 327 and D W 373, Vol 16, pp 51-88 and pp 381-388 respectively). In other words, it was admitted on behalf of the defendants that the witness was, as he himself stated, a *chela* of Harnam Das, his home was in a Punjab village in the district of Ludhiana, his original name was Fakhar Singh, his *guru's guru* was Charan Das, and Dharam Das was his *guru-bhai* or a *chela* of the same *guru*. It was only denied he had another name Darsan Das given to him by his *guru*, or that he had been to Darjeeling (see, for references, Darsan Das, Vol 11, p 378, ll 11-16 and ll 24-25, p 379, ll 5-6, l 9 and ll 24-28, p 380, ll 18-19, p 395, ll 31-41, p 396, ll 2-3 and p 411, ll 18-19, Dharam Das, Vol 16, p 51, ll 34-35, p 53, ll 18-20, p 66, l 18 and p 79, ll 6-7, Harnam Das, Vol 16, p 381, ll 11 and 17, p 382, ll 2-6 and p 384, ll 4-5 and ll 12-13).

Quite unwittingly, thus, it seems that the defendants through the two counterfeited *Bawas* they produced helped only to confirm the identity of the plaintiff's witness, and if the latter says he had been to Darjeeling and rescued the plaintiff, it would not be for these two men, impostors as they

were, to contradict his story, as on their own showing they had never visited that place

NOT A TUTORED WITNESS

If Darsan Das was a tutored witness, he need not have made his *guru* give him a second name Gopal Das, not at any rate before the Darjeeling episode, seeing that the plaintiff referred to him as Darsan Das. In his examination-in-chief he said that Gopal Das was a name given to him by his *guru* "some time" after he took the *mantra* (Vol 11, p 379, ll 25-26), which, as pointed out above, he had done in or about the year 1908 (*ibid*, p 378, ll 9 and 18 and p 379, l 5). In cross-examination he gave the time as "2 or 4 years" after the *mantra* (*ibid*, p 395, ll 36-37), but he afterwards corrected it in re-examination by saying that "years" was a slip of the tongue for "months" (*ibid*, p 418, ll 12-13), which would certainly be more in accord with his earlier statement. Mr Chandhuri would, however, see in this nothing but a mark of deliberate false evidence, forgetting that the longer period the witness gave in cross-examination would have suited the plaintiff's case better. To my mind the indication is just the opposite of what counsel suggests.

If it was concocted evidence that the man was out to give, equally might he have avoided mentioning that he had seen the plaintiff, and the plaintiff had asked him to depose, about one year before he actually stepped into the box as a witness on his behalf (*ibid*, p 393, l 27—p 394, l 13). Neither need he have volunteered the other story, again, in examination-in-chief, that he knew Billoo, had been taken to his house at Jaidebpur to treat his father Gobinda Babu for paralysis, had stayed there for a month or a month and a half, and that during his stay he had been questioned about the second Kumar, but given no reply (*ibid*, p 393, ll 8-17). All this meant for him having had to give explanations, but he was quite prepared to face the position, showing only a man fortified with the consciousness of truth. A false witness would not be thus creating unnecessary difficulties for himself.

It is perhaps worth pointing out that nearly all the comments which Mr Chandhuri is able to make on the evidence of Darsan Das arise out of what the witness states in his examination-in-chief, none really out of any facts elicited in cross-examination.

CORROBORATION

Darsan Das' evidence, as already stated, is corroborated in part by three other witnesses who were examined after him, Bejoy Krishna Gupta, Srish Chandre Gupta and Girija Bhusan Roy. Mr Chandhuri cavilled at them as "chance discoveries" made by the plaintiff's agents to bolster up the false story of the rescuing sadhu, but Girija Bhusan Roy explains the circumstances under which he came to be "discovered" (Vol 11, p 441, ll 23-36), and it was from him that the clue to the other two witnesses was found. Mr Chandhuri, while contending that these witnesses were called definitely with the object of lending "corroboration's crafty aid" to Darsan Das, still argued that they only helped to locate the "blanket factory" at a site which could not but falsify the evidence given by this man,—supposed corroboration, for some inexplicable reason, turning out to be downright contradiction.

LOCATION OF "BLANKET FACTORY"

This so-called "factory", or *karkhana*, as the plaintiff's witnesses described it, lay in fact to the north of the Kagjhora below the cremation ground, within a triangle formed by the Kagjhora and the Bryngwyn jhora as its two sides and the cremation ground as its base, at a point marked N in P.W. Kazi Samshuddin Ahmed's Map of the Municipal Vegetable Garden (Ex 411, *Book of Maps*, No 3). Darsan Das indicated its position fairly correctly when he said that the *karkhana* was about a quarter of a mile downhill from the *sasan* and to the west of it (p 403, ll 10-11), which would place it within the triangle.

Bejoy Krishna Gupta was not asked anything about the site at all, and merely said that it was downhill and reached by a narrow zig-zag way (Vol 11, p 424, ll 23-25).

Srish Chandra Gupta, the next witness, also stated that "one got to it by a zigzag road and after crossing a jhora" (Vol 11, p 428, ll 27-28), but he located it to the south of Kagjhora, placing it on what he called the Sedrabong Road (*ibid*, p 431, ll 30-36), and further said that municipal tax had to be paid for it, suggesting that it was on municipal land (*ibid*, p 431, ll 21-22). This was evidently wrong, but the mistake was probably excusable, seeing that he did not own the factory himself, but was only a kinsman of the owner, one Gostha Behari Roy, maternal uncle of Guriya Bhusan Roy (*ibid*, p 428, ll 20-22), and at any rate it shows that the witness was not giving tutored evidence.

Guriya Bhusan Roy definitely placed the *karkhana* outside the municipal area, and on land belonging to the Maharaja of Burdwan, on the left side of the path leading to the Sedrabong Electric Power House of the Darjeeling Municipality from Cart Road (Vol 11, p 433, ll 27-32). It seems to be clear, however, from the description the witness gives of the first of two alternative routes to the *karkhana* from Judge-Bazar that the site lay to the north of the Kagjhora (*ibid*, p. 434, l 22—p 435, l 8), and he correctly pointed it out as somewhere near N in Kazi Samshuddin Ahmed's Map (*supra*). According to him, to get to the *karkhana* one had to descend from the Cart Road by a *chore-bata* into a zig-zag path winding along further and further downhill till it reached the Power House, going past the *karkhana*. "At the point where one gets into the zigzag road from *chore-bata*", he said, "were the houses of Ginish Ghose, Hemendra Babu and two or three other *bhadralogues*, and another, my *mama's*, which we sold" (*ibid*, p 434, ll 33-35). Unfortunately, the witness went wrong in showing the position of these houses in the map at point M (*ibid*, p 435, ll 6-7), that is to say, somewhere within the triangle and north of the Kagjhora,—yet another proof, by the way, that this could not be tutored corroboration. Ginish Chandra Ghose himself, examined on behalf of the plaintiff, had stated that between his house which was known as "Town End" and the burning ground, lay the Kagjhora (Vol 3, p 479, ll 26-30), and it was also admitted on behalf of the defendants that this house stood south, and not north, of Kagjhora (D IV 402, Vol 17, p 209, ll 2-3).

On a fair reading of the evidence of these witnesses, there could thus be no question, as Mr Chaudhuri would suggest, of the rescuing sadhus having had to cross an impassable chasm in carrying the body from the cremation ground to the first hut to which they went—the only jhora they crossed was the small streamlet which intersected the foot-track from the old to the new *sasan*. And this is in fact just the evidence which Darsan Das himself gave.

The defendants led some evidence to show that the Maharaja of Burdwan had no lands north of the Kagjhora, and he had no tenant of the name of Gostha Behari Roy, but this evidence which was given, partly through D W 402, Sarada Prosad Bhattacharjee (*Vol 17, pp 208-219*) and partly through D W 412, Suresh Chandra Banerjee (*Vol 17, pp 317-318*), is far from convincing. Sarada Prosad Bhattacharjee says that as *jama moharee* of the Burdwan Raj Estate at Darjeeling, he would receive collections made by the jamadars from the tenants, and enter them up in the *thokas* or personal accounts of the tenants, name by name (*ibid, p 214, ll 1-11*), but neither can he give the year when he became *jama moharer* (*ibid, p 213, ll 42-43*), nor the names of the tenants in 1909 (*ibid, p 215, ll 36-37*). The *thokas*, again, are not produced which might show the name of Gostha Behari Roy. All that the witness remembers is that he entered the Raj service as *kharach moharee* in 1302 B S or 1895, and remained so for 5 or 6 years, after which he became *jama moharer*, continuing to be so for 7 or 8 years, as he once says, or for 6 or 7 years, as he says again (*ibid, p 208, l 13 and ll 21-23, and p 213, ll 43-44*). He refers to a survey of the Maharaja's Town lands by an *amin* Kshetra Nath Kar, but can give no exact information about it, saying that it was made either in 1314 or in 1315 or 1316 B S (*ibid, p 214, ll 11-22*). The survey was actually made in the year 1905-1908, and by Kshetra Nath Shaw, as is shown by a certified copy of the map prepared at the time which was afterwards produced by the other witness Suresh Chandra Banerjee. The witness, however, had not joined the service of the Raj Estate before 1914, and was not in a position either to prove the signature of the *amin* or to say if Kagjhora was shown in the map correctly (*ibid, p 317, ll 26-28*). The map was afterwards marked as *Ex Z(366)* subject to objection (*Book of Maps, No 12*), but it is no more possible to accept this document than to accept the statement of Suresh Chandra Banerjee that on the north of Kagjhora and below or to the west of Victoria Road, the Maharaja had no land (*Vol 17, p 317, ll 30-31*).

If it was Mr Chaudhuri's case that the site of the alleged *karkhana* was on municipal land, and not on land belonging to the Maharaja of Burdwan, as was positively affirmed by Girija Bhusan Roy, one does not know why learned counsel did not challenge the witness himself to produce the rent receipts from his uncle Gostha Behari Roy. It was no use trying afterwards to produce witnesses like Sarada Prosad Bhattacharjee or Suresh Chandra Banerjee without a scrap of document from the Raj Estate to support their bare statement.

That Gostha Behari Roy had a *karkhana* for the making of blankets and medicines near about the place, was in a manner admitted by the defendants, only that they were disputing the precise location of the site. Thus, the question was put to their witness Sarada Prosad Bhattacharjee in examination-in-chief in this form: "Was he (Gostha Behari Roy) tenant on any land of the Burdwan Raj below the Victoria Road in which he used to make blankets or medicines?" (*Vol 17, p 209, ll 11-12*). In cross-examination, again, he was asked: "Have you been to the place or *karkhana* where his medicines were made?" The answer was simply, "No", not that Gostha Behari Roy had no such factory (*ibid, p 216, ll 5-7*).

RIGHT CONCLUSION BY JUDGE

I have no doubt whatever that the learned judge came to a right conclusion regarding the "blanket factory", and regarding the evidence of Darsan

Das and the corroborating witnesses Quite candidly, he referred to a certain "obscurity" in the evidence (Vol 18, p 379, l 31 and p 398, l 6), but obviously this was due only to the difficulty of accurate description of the topography of the place, for, as Guriya Bhnsan Roy very truly observes, "one cannot describe, unless one goes there" (Vol 11, p 439, ll 33-34) I cannot help the remark that Mr Chaudhuri might well have spared the learned judge his thoughtless fling that this was only a disingenuous device on his part to get rid of a real difficulty in the evidence in order to come to a finding in the plaintiff's favour at all costs

Having held a local inspection ourselves at the joint request of the parties, I find myself in a position to state that if the learned trial judge had similarly inspected the place himself, as in fact he had been invited to do by the defendants by their petition of the 20th May, 1936 (Vol 17, p 426), he would have had no occasion to speak of any "obscurity", "extreme" or otherwise He, however, declined to make such an inspection on the ground that it was nobody's case that the hut mentioned by the plaintiff's witnesses still stood on the same site (Order No 1571 dated 20-5-36, Vol 1, pp 116-117) all the same, there can be no doubt that a view of the locality would have materially assisted towards a clearer appreciation of the evidence given by the witnesses

It is not necessary to deal with the question of rescue any further suffice it to say that in my view the evidence need not rest on identity at all, but stands on its own merits, not only helping fully to establish the story of rescue itself, but advancing the plaintiff's case of identity as well to a material extent

The learned judge really gave the evidence very much less than its full effect

SUMMARY OF FINDINGS ON DARJEELING CHAPTER

I have now exhausted my review of the main topics of the Darjeeling chapter, making an independent examination of the entire evidence, oral and documentary, with due regard to the criticisms advanced by Mr Chaudhuri, and it is my definite conclusion that the plaintiff succeeds on all material points *I hold without hesitation that the second Kumar did not die at Darjeeling, and that his body was not cremated I hold further,—and in so doing, I recognise I go beyond the trial court,—that he was the person who was rescued by Darsan Das and his companions from the cremation ground of Darjeeling*

FROM DARJEELING TO BUCKLAND BUND

In the view I take, in order to establish the plaintiff's identity as the second Kumar, it should be sufficient for him to show that the man who was rescued at the Darjeeling sasan in 1909 was the sadhu who turned up at Buckland Bund about 12 years later, and any enquiry as to what was the state of his mind during the intervening period, or whether he had any sufficient excuse for not returning earlier, would be wholly immaterial

Darsan Das and the plaintiff himself are the only two persons who give an account of this period, and if this is accepted, there can be no doubt that it carries the identity of the individual whose life-story they describe in one unbroken line through all these years

The story is one of wandering from place to place, from shrine to shrine, in the company of the sadhus, and not only is there no inherent improbability in it, but so far as one can see, there is practically no challenge in cross-examination of the long and extensive itinerary which both witnesses recount in such detail

The learned judge takes the view that from Darjeeling to Buckland Bund the enquiry is not to establish identity, but to see if anything excludes it, the identity being established by other facts (*Vol 18, p 402, ll 24-26*) Mr Chaudhuri maintains on the other hand that in arriving at a finding on the question of identity itself this part of the enquiry cannot possibly be excluded. The enquiry which either of them has in view, however, seems to be not so much as to the same man wandering about for 12 years from Darjeeling to Dacca as one about the abnormal state of mind which this person is supposed to have lapsed into during this period—an all but complete obliteration of all consciousness of his identity and of all memory of his past

ALLEGED "LOSS OF MEMORY" ITS BEARING ON THE QUESTION OF IDENTITY

Mr Chaudhuri makes the point that the plaintiff cannot be believed to be the second Kumar unless he can explain why he did not return home for so many years, and that as he has no other explanation to offer than this alleged loss of memory, it must necessarily be one of the vital facts in his case which he has to prove before he can establish his identity. If this fails, so it is argued, his claim to be the second Kumar must also fail, for it would mean that knowing himself to be the Kumar, he was still roaming about for 12 years in the company of naga sannyasis and virtually as one of them,—quite an impossible situation according to learned counsel. The attack on the learned judge accordingly is that he has treated the question of loss of memory from a perverted standpoint, and the suggestion is that he has deliberately done so in view of the difficulties inherent in what he himself recognizes as the all "very absurd" story of the plaintiff (*Vol 18, p 399, l 29*)

According to my view of the case, as I have explained above, irrespective of any question of loss of memory, the plaintiff's history of this period of life—from 1909 to 1921—is not essential so much for coming to a finding on identity, but really helps to furnish almost conclusive evidence of identity. For once it is established, as I hold it has been, that the second Kumar was the man rescued by the sadhus at Darjeeling, if it is further shown that he was the person who then went about wandering with them, and eventually emerged after a lapse of about 12 years at Buckland Bund, it must follow almost with mathematical certainty, to borrow a phrase of the learned judge, that the plaintiff was the second Kumar, there being no dispute that the Buckland Bund sadhu was the plaintiff. From this point of view, the only significance of the story of loss of memory would be whether or not this was so improbable, because seemingly so "very absurd", as to discredit the whole of the plaintiff's account

NOT A PSYCHOLOGICAL, "IMPOSSIBILITY"

As to this, the simple and sufficing answer would be,—as the learned judge points out, and as Mr Chaudhuri himself frankly conceded at one stage in his opening, though he tried to go back upon it in his reply,—that the loss of memory alleged by the plaintiff, however rare and exceptional a phenomenon it might have been, was after all not a psychological or psycho-physical "impossibility", and the only question would be whether or not this did occur as a fact,—not that the plaintiff would be bound to prove it for the success of his case, but only to see whether there was anything in it which might be supposed to falsify his story

I consider a discussion of the expert evidence on the subject futile and unnecessary admittedly, abnormal psychology has not yet advanced to the precision of an exact science to such an extent that one may dogmatise about it with certainty, and merely because the experiences of the plaintiff as revealed by himself or by Darsan Das cannot be fitted into one of the known or recorded types referred to by the experts or in standard treatises, it does not in my opinion follow that the plaintiff's story must be summarily discarded as something which could not possibly have happened

ONLY QUESTION, IF THIS WAS A FACT

Looking at the matter from Mr Chaudhuri's point of view, we may examine whether loss of memory has or has not been established as a fact. His first complaint is that the plaintiff has failed to give any credible explanation for his alleged mental condition, but this, as I apprehend it, can at best be only a matter of speculation or theorising, and speaking for myself, I am not prepared to discount such a fact merely because no definite reasons can be given to account for it

Mr Chaudhuri's next point which he elaborates at great length is that the story is discredited by the various conflicting and inconsistent versions given of it. Loss of memory, he says, is an after-thought on the part of the plaintiff to account for his non-return, his first version being that he was prevented by physical and moral restraint from leaving the sannyasis

If the object was only to find some plausible excuse for not having returned home for 12 years, one cannot help feeling that one explanation was just as good as another, and loss of memory need not have been falsely invented later on just to contradict a case made at an earlier stage

PLAINTIFF'S ACCOUNT NOT TO BE SUBJECTED TO METICULOUS SCRUTINY

In my opinion, it would be not at all fair to subject the evidence to a meticulous scrutiny in order to discover a contradiction. Leaving aside Darsan Das' account, whatever versions may have been given must nearly all have emanated from the plaintiff himself, and in recounting the experiences of an abnormal period of his mental life, he could obviously be describing only as much or as little as he happened now to remember after his return to a normal state of mind. It would be too much to expect under the circumstances of the case that he should be able to give a perfectly

consistent, connected or coherent account of all that he had passed through if he is to be believed, he must have undergone nothing short of a revolutionary transformation in his mental make-up which he did not recover till many years after, and the surprise is that he is able to say as much as he really does, not that he cannot say more, or say it with the art and finish of a tutored liar. It would baffle even a normally constituted person to recall with precision the state of his mind during, say, a temporary fit of delirium how much more difficult would it naturally be for a man whose mind had been literally turned upside down to say years afterwards how exactly he had felt or reacted to his surroundings at any particular stage of his abnormal life!

Mr Chaudhuri refers to a number of witnesses to whom the plaintiff is supposed to have said that he had often wanted to come back, but that the sadhus would not allow him to do so

Kamal Kamini Devi (on commission),—Vol 1, p 224, ll 1-9 and p 225, ll 7-10

Satya Dhenu Ghosal (on commission),—Vol 4, p 7, ll 24-26

Ganga Prosad Chondhury, P W 377,—Vol 6, p 358, ll 38-41

C R Mitter, D W 26,—Vol 12, p 503, ll 27-28

Ordhendra Coomar Gangoly, D W 291,—Vol 15, p 384, ll 11-12

PLAINTIFF'S OWN VERSION OF HIS LIFE DURING THIS PERIOD

The plaintiff's story as given in his own evidence has been set out by the learned judge in his judgment (Vol 18, p 398, l 26—p 399, l 28). Up to Asighat, it appears his memory was practically an utter blank (Vol 4, p 101, l 36—p 102, l 3) thus covered a period of about a year (*ibid*, p 102, l 5-6). He had "no consciousness at all—no knowledge", as he says in cross-examination (*ibid*, p 159, ll 27-28). From Asighat he went to Amarnath, a famous Hindu shrine in Kashmir, in about four years or so (*ibid*, p 102, ll 14-15), and here took place an important incident in his life, for he was given a *mantra* by Dharam Das, and became his *chela* (*ibid*, p 102, ll 17-20). From now onwards the sannyasis began to call him Brahmachari (*ibid*, p 102, ll 20-21), and it was after this *mantra* that for the first time he had an "idea" how he had come to be among these people—an idea that he had been found in a wet condition at Darjeeling *sasan* (*ibid*, p 102, ll 21-28). He could not, however, recall who he was or where he had his home (*ibid*, p 102, l 29). As he puts it in cross-examination "I had ordinary knowledge of things after Asighat—only I did not know my home and people" (*ibid*, p 159, *marginal note*, added when the evidence was interpreted to the witness). "After the Guru's *mantras*, my knowledge slightly returned. I had no idea of what the world was till the *mantra*" (*ibid*, p 159, ll 29-30 and 32-33). After this he used to think sometimes in his mind where his relations were, and he would tell this to his Guru. "We would talk about my going back to my home and relations. Guru said—I shall send you home *when the proper time comes*" (*ibid*, p 102, ll 30-36). He understood that the guru would then let him go back home, and understood further that if he could there rise victorious over his environment of temptation, or conquer *maya*, as he put it,—*maya* meaning fondness for or attachment to the things of the world,—and afterwards returned to his guru, the latter would then initiate him into the vow of *sannyas* (*ibid*, p 102, l 37—p 103, l 3). The "*proper time*" arrived,

as he explains later, when at Braha Chhatra it flashed upon him for the first time that his home was at Dacca "Go, your time has come", said the guru, "go back home" And then he parted company with his guru and the other sadhus, arriving at Dacca after a year's wandering through various places (*ibid*, p 103, ll 16-22) His guru did not know whether he was a Raja's son, or a Bengalee, or anything about his home or his property. if he had known, he would have sent him home (*ibid*, p 160, ll 8-11).

DARSAN DAS' ACCOUNT

Substantially to the same effect is the evidence of Darsan Das, who also speaks of the giving of *mantra* at Amarnath (Vol 11, p 388, ll 25-26), and of the incident at Braha Chhatra, giving in fact a much fuller account of the latter (*ibid*, p 389, l 37—p 390, l 22) "At Braha Chhatra", he says in cross-examination, "the *Brahmachari* said he recollected his home was at Dacca Before that none of us—none of the four—knew that his home was at Dacca Nor that he was a Raja's son or Bengalee Raja's son or if he belonged to Bhowal or where he had come from or who he was, or his name or any particular" (*ibid*, p 407, ll 31-35) As the witness puts it later, "he had not attained *puina jnan* (full consciousness) in the sense of knowledge of home and of one's people and affairs until he left us at Braha Chhatra" (*ibid*, p 413, ll 29-31)

"To Court—Then there was *puina jnan*, we thought, as he mentioned his home We thought he had come to his *chaitanya* (awakening)

"As he was mentioning his district, Dharam Das thought his *puina jnan* had returned, and therefore, permitted him to go" (*ibid*, p 413, ll 32-36)

As I read the evidence of these two witnesses, it means that the plaintiff felt vague longings for his home and his people from after Amarnath, but without knowing where it was or who they were, and he naturally preferred to obey his guru, and wait until the "proper time" arrived when the guru himself would send him back The "proper time" came only when his guru believed his memory had returned, and till then it is obvious there could be no question of his going or being allowed to go, neither he nor his guru knowing the place he was to direct himself to

SUPPOSED INCONSISTENCIES IN VERSIONS OF OTHER WITNESSES

It is just possible that this simple fact might have been understood by those to whom the plaintiff had spoken about it as if he had been prevented by the sadhus from coming back home, though he was willing and anxious to do so, and this may account for the so-called inconsistency which Mr Chaudhuri has been so astute to discover in the evidence of the plaintiff's witnesses If counsel was going to rely on the statements of these witnesses as establishing a contradiction, one fails to see why the plaintiff was not questioned about them some of the witnesses like Kamal Kamini Devi and Satya Dhenu Ghosal had in fact been examined before him

According to Kamal Kamini Devi, the plaintiff is no doubt supposed to have told her that the sannyasis would always stay with him and keep him

"confined", not relaxing their vigilance even when he had to go out for necessary purposes (Vol 1, p 225, ll 7-10), but at the same time she did not know if the plaintiff had given out any particulars to the sannyasis about his identity (*ibid*, p 224, l 30). As for Satya Dhenu Ghosal, he said quite plainly that what he understood from the plaintiff was "that he (plaintiff) wanted to come back, but his guru said that it was not the proper time" (Vol 4, p 7, ll 27-30). It will be seen that Kamal Kamini Devi's statement about the sannyasis mounting guard over him even when he went to answer calls of nature, was put to this witness, though it was not put to the plaintiff, and the answer was "No, I have not heard that" (*ibid*, p 8, ll 1-4). Ganga Prosad Chowdhury's statement merely is that on his asking the plaintiff why he had not come home so long, the latter said "My guru had forbidden me to come" the witness did not ask why the guru had done so, or any further particular (Vol 6, p. 358, ll 38-42). This is not only not inconsistent with, but fully supports the plaintiff's version. The two defence witnesses on whom Mr Chaudhuri relies also prove nothing to the contrary.

Mr Chaudhuri refers to the evidence of yet another witness, P W 167, Hemendra Kishore Acharyya Choudhury, which he says gives a still different version, namely, that the plaintiff did not return home as he preferred the life of an ascetic, but the witness clearly states that the plaintiff was saying, "he had lost all memory of home and his people". The further statement that the plaintiff said he was "living with sannyasis and liked that sort of life without a thought of home", even if it correctly represents what the plaintiff is supposed to have told the witness, does not really suggest a new reason for his non-return (Vol 5, p 279, ll 20-23).

It is significant that out of the witnesses who have given evidence on the subject, Mr Chaudhuri is able to pick out only these few to support his theory, and that, even so, he can do no more than rely on statements which are after all not of an unequivocal character. As against these, there is quite a respectable body of evidence on the plaintiff's side from men of undoubted credit, showing clearly that the reason why the plaintiff stated he did not return was that he had lost all memory as to his home or as to his own identity. Suffice it only to give a few references to such evidence —

P W 437, Hemendra Lal Das (in cross-examination)

"I asked him where he was during his 12 years' absence or why he had not come home before. He said he had no recollection as to who he was or where his home was. He said that directly he remembered that Dacca was his home, he set out for Dacca. I did not ask when he remembered that."

Q—Did you realise that he started for Dacca when he remembered that his home was at Dacca and that he was Kumar of Bhowal?

A—He only said he started directly he remembered that his home was near Dacca.

Q—Did he say that sannyasis would surround him and would not allow him to come?

A—No" (Vol 7, p 35, ll 15-26)

P W 472, Abdul Mannan (in examination-in-chief)

"During my conversation with him at interviews subsequent to the first, I asked the plaintiff about where he was during the 12 years of absence."

Q—What did he say?

A—He said he was at various places mentioning shrines
I asked him why he had not come so long

Q—What did he say?

A—He said he had no memory of who and what he was and where his home was" (Vol 7, p 179, ll 22-29)

There was no cross-examination on the point

P W 952, Monmohon Bhattacharjee (in examination-in-chief)

"During this visit I asked the plaintiff where he was during his absence He said he was roaming with sadhus and sanniyasis in hills, jungles and shrines I did not ask which hills and so forth, minutely I asked him why he had not come back so long He said he could not remember things I did not ask when his memory revived"

(Vol 10, p 463, ll 10-14)

Here, again, there was no cross-examination

P W 977, Satinath Banerjee alias Sagar

"I asked the plaintiff where he was during his 12 years' absence He answered my questions I asked him why he had not come back before He said, I had no memory of anything" (Vol 11, p 197, ll 13-15—in examination-in-chief)

"I do not remember when I first asked why he had not come back earlier I did not know from any other source until he told me why he had not come back so long I did not hear anybody ask him till the meeting day why he had not come so long" (ibid, p 205, ll 9-12—in cross-examination)

One witness had been examined before the plaintiff, P W 5, Suresh Chandra Mukherjee, who said

"At this meeting I had conversation with him This was about where and how he had lived so long He said he wandered about in hills and mountains and jungles, and Kashmir and Jalamukhi and Pashupatinath in Nepal and such places I did not ask him that day why he had not returned so long" (Vol 4, p 57, ll 34-38)

"I asked 'If your desire for Raj continued, why did not you come before?' He said he had lost memory of who he was and where his house was and he vaguely recollected having a home somewhere He asked his guru about his home and the guru would say 'I shall let you know in the fullness of time' He, the guru, had only said, he, the plaintiff, was a Bengalee" (ibid, p 58, ll 1-6)

The witness fully maintained his story in cross-examination (ibid, p 67, ll 1-20)

I hold that the plaintiff's evidence as to loss of memory stands wholly unshaken

JHALKI INCIDENT

There is another witness of the plaintiff, P W 645, Anath Bandhu Bhattacharjee, on whom Mr Chaudhuri strongly relies, for the purpose of contradicting the story of alleged loss of memory or loss of consciousness of

identity This witness says that about 20 or 22 years ago, i.e., in 1912 or 1914 (for he was giving evidence in 1934), he had met the plaintiff at a place called Jhalki near Mussoori, seated among a number of sadhus, and that he recognised him there as the second Kumar of Bhowal. He spoke to him and said, "Why are you here?" "Go home." The plaintiff is said to have replied in Bhowal tongue "Guru knows." The witness then asked him when he would go back home. The reply was "I cannot say" (*Vol 8, p 211, ll 18-36*). In cross-examination the witness states that he told the sannyasis that the plaintiff was the second Kumar, a Raja's son, and that his home was at Jaidebpur (*ibid, p 215, ll 36-40*). Addressing them he also said "Send him home. He will be a Raja" (*ibid, p 216, l 4*). The supposed reply of the sannyasis is given in re-examination:

"His is the usual lot of a Raja's son. Look at Ram Chandra, Nal Raja and Maharaja Juddhishir. When his *sani* (evil star, lit Saturn) will pass off, he will go of himself. Why should we bother?" (*ibid, p 218, ll 6-9*)

Whether the sadhus did or did not say this, it was still not an unlikely answer for such people to have given.

I must say I am not particularly struck with the evidence of this witness who is in fact not referred to by the learned judge at all in connection with this part of the case. The witness was purporting to speak of an incident which had happened many years ago, and which had apparently not made any great impression on him, considering his subsequent conduct in not reporting the matter forthwith to the Raj family, as one should expect him to have done, if, as he says, he knew that they had been making enquiries to trace the whereabouts of the second Kumar. Supposing he had met the second Kumar at Jhalki in the company of sadhus at or about the time he mentions, I should still hesitate to accept his recollection so many years later of the conversation which he is said to have had with these persons. His evidence as it stands need not, however, militate against loss of memory on the part of the plaintiff, and in so far as the sadhus are concerned, it shows no more than that they were told about the identity of the plaintiff. But whether the sadhus accepted the statement of the witness or not would be another matter. Darsan Das, as already stated, says in fact that before Brahma Chhatra they did not know if the *Brahmachari* was a Raja's son, or belonged to Bhowal (*Vol 11, p 407, ll 31-35*). In any case, there is his further statement that even if anybody had told them all about the *Brahmachari*, they would still not have let him go unless they had the particulars from the man himself (*ibid, p 419, ll 22-35*).

ALLEGED INCONSISTENCY WITH MEMORIAL VERSION

Another way in which Mr Chandhuri seeks to discredit the story of loss of memory is by showing a discrepancy between the plaintiff's evidence and the version he gives in his memorial to the Board of Revenue. Paragraphs 7 and 8 of the memorial (*Ex J, Vol III, p 93*), as worded, do not certainly suggest that he was unaware of his identity throughout the whole period of his wanderings with the sadhus. It is no doubt stated in paragraph 7 that as a result of what is described as a "crisis" in his life, he suffered from "a complete forgetfulness of everything connected with the previous years of his life", but he is said to have suffered from it only "for some time", which, read with the sentence which follows immediately after—that "gradually he

regained his senses and found himself as one of the *naga sannyasi*,"—seems to imply that this state of "complete forgetfulness" continued only during the period he lay unconscious after his body was "picked up from the cremation ground" It is stated further that on regaining his "senses", from then onwards he led the life of a *sannyasi*, the same as that of his "new associates", "immersed in their atmosphere for nearly twelve years", expressing himself through their language and garbed also in their manner, all of which, again, conveys the idea that this was a conscious life he was living, with full knowledge of who or what he was There is no suggestion anywhere that it was at Brahma Chhatra that he had his first revival of memory, and that to the limited extent of realising simply that his home was at Dacca

Paragraph 8 then states that after he had travelled all over India for 12 years, his guru advised him to re-visit his native place according to the "custom" of the *sannyasi*, but it is added that his guru enjoined him neither to reveal his identity nor to return to his family, and that on his part he had no mind to disobey the injunction This, again, is far from being an indication that he had lost all sense of his identity nor is there any hint that he was permitted to come back on his recollecting that his home was at Dacca on the other hand, reference is made to a "custom" of the *sannyasi* to account for his return to his native place, though in his evidence he stated as follows

"After I took *mantra* I did not hear how long I was to remain a *chela* Nobody told me then, it was to be 12 years, and then there was to be a visit home, and then if I could get rid of *maya* (attachment), I would be initiated Nobody told me that at any time before I came to Dacca" (Vol 4, p 159, l 34—p 160, l 2)

It can hardly admit of dispute that the memorial version, taken broadly, does not correspond in all particulars with the case made at the trial, though no doubt it may be possible, by a forced construction, to say that "regaining his senses" in paragraph 7 means only recovery of consciousness, and not recovery from the state of "complete forgetfulness", and though paragraph 9, again, expressly states that it was from Buckland Bund onwards that "memories of the past life began to quicken within him and an impulse to go back once more to his family grew" The implication is in fact unmistakeable that according to the memorial the plaintiff had not wholly lost consciousness of his identity, his categorical statement being that he had been enjoined by his *guru* to conceal it, and he himself was by a conscious effort minded to do so

HOW FAR IT AFFECTS PLAINTIFF'S CASE OF LOSS OF MEMORY

All the same, however, I still think that it would not be quite fair to attach an exaggerated importance to the memorial as Mr Chaudhuri seeks to do The plaintiff obviously cannot disavow responsibility for this document it had been read out to him before he signed it, and he says he would not have signed it, if he thought there had been a mistake (Vol 4, p 161, ll 12-13 and 14-15) At the same time, there need be no reason to disbelieve him when he states "I can't say what they (meaning his lawyers) wrote in my memorial to the Board" (*ibid*, p 161, l 12) The plaintiff was illiterate, and would not understand a word of the language in which the memorial had been drawn up he had left it to his lawyers, and naturally, would

not be too censorious of what they had produced. The lawyers must no doubt have acted on his instructions. He himself says that he had told his case to Mr Dwarka Nath Chakravarty and his pleader Amar Bose (*ibid.*, p 161, ll 11-12), but the instructions could not have been full or detailed, so far as this part of his life was concerned. If the plaintiff is to be believed, it was only in court that he for the first time revealed his life-history (*ibid.*, p 135, l 30). For the purpose of the memorial it was not in fact necessary to go into a detailed account of his life with the sannyasis. One cannot, again, rule out the possibility of the draftsman misunderstanding the instructions given by the plaintiff.

In judging the case made in the memorial, it would in my opinion not be right to lose sight of the purpose for which it had been prepared. It was certainly not intended to be a statement of claim at all, nor was it concerned to give any explanation for the delay in the plaintiff's return. The object was merely to induce the Board of Revenue to cancel the "impostor notice", and hold an enquiry into the plaintiff's identity in his presence, and rightly or wrongly, as the memorial itself will show, for this purpose reliance was placed more on the facts and events which transpired since his advent at Buckland Bund as well as those of his "pre-sannyasi days", rather than on the story of his life during the intervening period.

In my view, therefore, the want of strict conformity of the evidence to the memorial cannot be held in any way to affect the plaintiff's case regarding loss of memory, there having been in fact no occasion for making a case on the point in the memorial.

Apart from relying on paragraphs 7 and 8 of the memorial, Mr Chandhuri calls attention also to the depositions of Joges Chandra Roy and Rabindra Nath Sanyal in the Defamation case, extracts of which are annexed to the document (*Vol III*, pp 117-118). Both these witnesses say that they saw and recognised the second Kumar at the Darjeeling Railway Station as he was leaving by train a few days after his alleged rescue, and that when they were about to accost him, he turned away his face from them, as if in annoyance, which, it is said, clearly goes to show that he could not have lost consciousness of his identity. The plaintiff was questioned about this in cross-examination, and his answer was that he did not know and had no idea that he had so behaved at the time as if he had been anxious to avoid recognition (*Vol 4*, p 163, l 35—p 164, l 3), an answer which is quite consistent with the case made by him.

As regards the statements of these two witnesses, it is to be observed, in the first place, that they did no more than give their own impression, and I do not think that their evidence as to how the plaintiff had behaved on the occasion can establish that this was a conscious act on his part. Secondly, it would be wrong to suppose that in annexing these depositions to his memorial, the plaintiff in any way accepted or adopted their evidence as part of his case. One does not really see how the statements can be used as evidence against him at all. The plaintiff was undoubtedly a more competent witness in the matter.

OVERCOMING OF "MAYA"

A point on which Mr Chandhuri laid some stress was that if the plaintiff had completely lost the sense of his own identity and only remembered vaguely that his home was at Dacca, he could not have been sent back by his guru to overcome *maya*, which implies, as he put it, knowledge of himself

in mental association with his former environments. Learned counsel was apparently under a misapprehension. For one thing, there is not only nothing to show that when the plaintiff mentioned Dacca as his home to his guru, the guru might not have supposed this to be a full revival of memory,—not merely of the memory of his home, but also of his own identity—but on the other hand, there is the evidence of Darsan Das, who, in reply to a question from the court, said quite definitely that the sadhus took this to be a sign of *purna jnan*. "Then there was *purna jnan* (full sense) we thought, as he mentioned his home (wrongly printed as name). As he was mentioning his district, Dharam Das thought his *purna jnan* had returned and therefore permitted him to go home" (Vol 11, p 413, ll 32-36).

Then, again, it is I think a misreading of the plaintiff's evidence to suppose that he believed he had been sent home by his guru for the avowed purpose of overcoming *maya*, in other words, that he might submit himself to this final test in order to qualify for initiation as a full sannyasi. Nowhere has the plaintiff said so, though no doubt he says both in his evidence and in his memorial that his guru had forbidden him to reveal his identity (Vol 4, 103, l 40, and Vol III, p 93, ll 30-31). According to his evidence he would be talking with his guru after Amarnath about his going back to his home and relations, and the guru offered to send him home when the "proper time" came (Vol 4, p 102, ll 34-36). When the time did arrive and he was permitted to go, there was, however, no direction by the guru that on going back home he should put himself to the *maya* test, and then return. In cross-examination the plaintiff in fact clearly stated that nobody had told him at any time before he came to Dacca that if he could get rid of *maya*, he would be initiated (*ibid*, p 160, ll 1-2). This is what he understood himself, not his guru's behest (*ibid*, p 102, l 37—p 103, l 3).

As Darsan Das, giving a fuller account of the incident, says, when at Brahmacharya the *Brahmachari* had his first flash of memory about Dacca, and he mentioned it to his guru, the guru simply enquired if he wanted to go home, and not stay with them (Vol 11, p 390, ll 14-15). The *Brahmachari* asked if he could come back again, and to that the guru replied, "You may come back if your people permit you, but if they receive you and keep you with affection, you need not" (*ibid*, p 390, ll 18-20). There was no cross-examination of the witness on the point, and this evidence is quite in accord with that of the plaintiff himself, lending no support whatever to the theory that the overcoming of *maya* was the object of the plaintiff's return to his native place.

REVIVAL OF "OLD MEMORIES" AT BUCKLAND BUND

It was at Buckland Bund, as people passing him went on saying, "He is the Bhowal Kumar", that the plaintiff recollected that he was the second Kumar of Bhowal (Vol 4, p 160, ll 29-31). His "old memories" returned—about his home and his relations (*ibid*, p 160, ll 35-36). Mr Chandhuri asked him if he thought then of breaking the *maya*, and his answer was in the negative (*ibid*, p 160, ll 32-34).

Counsel put him a further question

"Q—Then when you went to Jaidebpur you had remembered all, and only wanted to break the *maya*?"
to which he replied

"A—Yes. That was guru's orders" (*ibid*, p 161, ll 3-5).

Counsel led him to this answer, but what the plaintiff meant was only his guru's injunction not to disclose his identity, an injunction which I do not think would necessarily call up in imagination a picture of himself in association with his friends and relations and the environments of his former life. Such a picture rose to his mind for the first time in the real when he found himself back amidst his own people, and it was then that he felt the lure of family life beginning to grow on him, and realised too that he would have to rise above it, if he meant to return to his guru, as obviously he wanted to do.

CASE IN PLAINT

In a hyper-critical spirit Mr Chaudhuri refers also to the plaint (*Vol 1, pp 119 et seq*) to point out a supposed contradictory case made therein regarding loss of memory. The plaintiff, it is said, only pleads a partial loss of memory as the result of poisoning (*ibid, p 120, ll 32-34*), makes no mention of the guru's behest to go back, and suggests a mere chance return to Dacca "in the course of his wanderings" (*ibid, p 121, ll 9-10*), while expressly averring an "indifference to the world" due to wandering with the sadhus (*ibid, p 120, ll 35-37*).

The criticism hardly calls for serious notice. The plaint does not profess and is certainly not expected to set out details, but gives the case only in broad outline, and this was again a document which his lawyers drew for him (*Vol 4, p 161, ll 15-18*), but on a fair reading of it, there does not appear to be anything pleaded which is inconsistent with the evidence.

To say that his memory was "almost effaced" during the period he was living with the sadhus does not only not involve any contradiction, but seems on the other hand to be just a correct representation of the facts as brought out at the trial, as this would allow for the glimmerings of memory he had after Amarnath and then for the fuller flash at Brahma Chhatra. The statement that the loss of memory was due to the administration of poison was only the plaintiff's own explanation for it, the alleged poisoning being stated as a fact, true, not to his "knowledge", but to his "belief and information" (*Vol 1, p 125, ll 25-31*). As he stated in cross-examination, he was not in a position to say that anybody had tried to kill him by poison, as he did not know (*Vol 4, p 161, ll 25-26*). As for the guru's behest to return, there was no such behest and there would be no occasion for mentioning it in the plaint. Then, it is a mis-reading of paragraph 4 of the plaint to say that the plaintiff's arrival at Dacca was accidental. He was not seeking to explain the circumstances which brought him to Dacca, and the words used "in the course of his wanderings" would not certainly be inconsistent with his actual case. Regarding the alleged indifference to the world, this again was a *post facto* description of himself during his wanderings, and did neither purport to be an explanation for his non-return, nor suggest that he was conscious of the world all these years. In cross-examination he said in fact "I had no idea of what the world was till the mantra. If I did not know the *sansar* (world), I could not be *sansar-bhishina* (averse to the world and worldly attractions)" (*ibid, p 159, ll 32-34*).

CONCLUSION

As I have said before, if, as Mr Chaudhuri suggests, loss of memory was necessary for explaining the delay in returning home, I see no reason why

the plaintiff or his advisers should have deliberately made a change of case in regard to this. On a consideration of the evidence, I have no hesitation in saying that Mr Chaudhuri's attempt to assail the plaintiff's story utterly fails. Loss of memory has in my opinion been established as a fact, and I hold that it was neither an after-thought, nor a device to explain something which the plaintiff did not otherwise find it possible to account for. I fully accept the evidence of the plaintiff and of Darsan Das on the subject.

IDENTITY CHAPTER

I may now pass on to the question of identity, the most vital part indeed of the plaintiff's case, which, as I have indicated before, he must have to face as an independent issue, even though he may have successfully met the defendants on their own ground as regards alleged death and cremation at Darjeeling. The trial court has in my opinion dealt with the matter as exhaustively as possible from all points of view, but not of course to Mr Chaudhuri's satisfaction, the judgment on this part of the case, according to learned counsel, not only not resting on a proper foundation, but seeking to avoid the real issues, and being reducible in its ultimate analysis to no more than a finding based on mere recognition of the plaintiff as the second Kumar by Jyotirmoyee Devi, and to a lesser extent only, by Rani Satyabhama Devi. In other words, the suggestion is that the court, instead of coming to an independent decision on a question which it was for itself to decide, only placed two interested parties in the seat of judgment.

MR CHAUDHURI'S CRITICISM OF JUDGE'S TREATMENT

To my mind, the attack is as unfair as it is unfounded. If I understand Mr Chaudhuri aright, the learned judge is supposed to indicate correctly enough the tests which have to be applied to find out identity, but in dealing with the evidence, it is said, he relies on nothing more than mere similarity of appearance. He is charged with relegating what he calls the mind of the plaintiff to a secondary position, and placing in the fore-front only the identity of the body. In point of fact, so it is argued, he does not find anything in the mind of the plaintiff which he accepts or which may be accepted as proving identity, and even as regards physical identity, though he no doubt mentions five heads under which the evidence may be classified, namely, (1) recognition by Jyotirmoyee Devi and Rani Satyabhama Devi, (2) recognition by tenants and by relations and acquaintances, (3) photographs, (4) bodily marks, and (5) general characteristics of the body, yet in actual treatment of the subject, he ignores the second head altogether, and on the third and fourth heads, comes to conclusions only of a negative character,—neither the photographs nor the marks going to establish the plaintiff affirmatively as the second Kumar, the finding as to marks being in fact not a finding of identity by the marks, but of marks by identity,—while under the last head, the findings he records are of an equally inconclusive character. In the result, therefore, it is pointed out, leaving aside recognition by the sister and the grandmother, the learned judge does not treat any evidence as to bodily features as evidence of identity, but assumes identity to explain the alleged "similarity", and as for mental identity, he makes no real or independent examination of the question, but merely says that the plaintiff is to-day what the second Kumar might be.

expected to be, which amounts to finding only a kind of "speculative" similarity. Putting the matter in another form, Mr Chaudhuri says that the learned judge does not regard identity as proved by the bodily and mental features, but simply finds nothing in these features to militate against identity as proved by "direct evidence", thus "direct evidence" being, therefore, something outside body and mind, that is to say, nothing but recognition, which reduces itself, again, to recognition by Jyotirmoyee Devi and Ram Satyabhama Devi—the first only of the five modes of proving physical identity which he himself indicates.

The whole of the judge's reasoning is thus said to move in a vicious circle—the correctness of recognition being supposed to depend upon the identity of bodily and mental features, and such features, again, being held in their turn, not to prove identity, but merely to "endorse" identity proved by "direct evidence".

To support his own line of reasoning Mr Chaudhuri referred to a number of isolated passages which he picked out from different parts of the judgment, but I cannot help saying that it was only an elaborate piece of casuistry he produced by this dexterous weaving together of disjointed quotations. No grosser perversion of the true perspective of the judgment could in fact be presented. As I have already had occasion to point out, one has only to study the scheme of the judgment as a whole to find out how logically and fairly the learned judge has in fact dealt with the question of identity, leaving out not a single test, physical or mental, in arriving at his conclusion.

RELIANCE ON "DIRECT EVIDENCE"

The learned judge no doubt relied strongly on the "direct evidence", and particularly on recognition by Jyotirmoyee Devi and Ram Satyabhama, but thus he was entitled to do, only that in my opinion he failed to give effect to it to the extent to which he might and should have done. It is, however, a negation of the truth to say that this was the only or the main basis of his finding.

"I find", says the learned judge, "that the lady Jyotirmoyee Devi did honestly believe that the plaintiff was her brother, and it remains to be seen whether that belief proceeded from a genuine recognition. Mr Chatterjee contends that honest recognition by the sister carries the plaintiff the whole way. It does so in a sense that involves tautology. *Honest belief even in a sister is not conclusive, though it demolishes the utter dis-similarity theory.* It undoubtedly carries the plaintiff a great way, but a single point of difference, like death itself, or a different mind, or proof that he is not a Bengalee, might displace him altogether" (*Vol 18, p 94, ll 28-37*).

This shows quite clearly that the learned judge carefully avoided coming to a conclusion about the plaintiff's identity merely on the strength of Jyotirmoyee Devi's recognition of him as the second Kumar, honest as he held such recognition to be, though no doubt he depended on it as demolishing the defence theory of "utter dis-similarity".

To my mind it is the plaintiff who might have a legitimate ground of complaint that the court below subjected him to far stricter and to a far larger number of tests than it need or should have done. Honest recognition by Jyotirmoyee Devi, and by Ram Satyabhama Devi, as well, followed by

their acceptance and adoption of him as the second Kumar might well have been regarded in the circumstances of the case as sufficient to establish identity, both physical and mental, beyond all reasonable doubt

VALUE OF "RECOGNITION" AS EVIDENCE OF IDENTITY

Recognition as evidence of identity, being based only on personal impression, however *bona-fide*, is perhaps of all classes of evidence the least to be relied on, and may in a sense be regarded as no better than opinion evidence, a mere inference from apparent sameness of appearance, in which peculiarities of form, shape, colour, sound, etc., all contribute only in their totality to produce a composite image in the mind, but there is no conscious analysis or comparison of individual bodily features on the part of the observer. But uncertain or unsafe as such evidence may, therefore, be standing by itself, as a basis for a finding of identity, it may nevertheless acquire indubitable value when supported by other facts such as were present in this case.

The "direct evidence" of recognition by Jyotirmoyee Devi and other near relations on which the learned judge here relied was not recognition, genuine as it was, based on a bare impression of the plaintiff's identity from mere physical appearance, but such impression confirmed at first by actual examination of bodily marks, and strengthened and deepened later by revelation of mental identity through long and intimate association with him in the course of his living in their midst as a member of the same family. Thus last fact is indeed one of overwhelming significance, the effect of which the learned judge does not appear, however, to have fully realised, as furnishing undoubtedly the best and most convincing evidence of identity, bodily and mental, assuming of course honesty on the part of the relatives.

HONESTY OF JYOTIRMOYEE DEVI

In my opinion the defendants have signally failed to show that the act of recognition by the sister and other relations was or could be dishonest. As I have already shown, the suggestion of a sudden conspiracy on the part of Jyotirmoyee Devi which led her to propound the plaintiff as the second Kumar, knowing him to be an impostor, is a proposition for which there is not the slightest foundation, and Mr Chaudhuri himself was unable to support it before us. If, then, her conduct was *bona-fide* to start with, as I hold it must have been, I for one refuse to believe, supposing she afterwards found out she had made an honest error, that she should still persist in it and cling to the impostor as her own brother. That might have been Landsay's idea, but is certainly not mine. Landsay, it will be remembered, writing to the Commissioner of the Dacca Division on the 9th August, 1921, actually suggested that the sisters of the second Kumar having "openly espoused the cause of the sannyasi", it would be "very difficult for them to withdraw from the position they had taken up" (*Ex 435, Vol II, p 337, II 22-26*), but then Landsay never believed that these ladies had acted honestly at any stage or could have any sense of honour left in them, though they would have nothing whatever to gain by being a party to such a monstrous fraud. Speaking for myself, I believe every word of Jyotirmoyee Devi when she says —

"By accepting the plaintiff I am a ruined woman, financially speaking. For him alone I had to borrow Rs 10,000/- to 12,000/- I was pre-

pared to lose all for my brother—who would not be? I would not be, if he were an impostor. On the other hand, if he were so, I would see him punished" (Vol 8, p 315, ll 22-25)

A simple and straightforward statement on which Mr Chaudhuri dared not cross-examine the witness. Not even Landsay's suggestion was put to her that having taken a false step, she felt bound almost by a tragic necessity to persevere in it.

MENTAL IDENTITY

Mr Chaudhuri laid considerable stress on mental identity, but though, as I have said, the fact of the plaintiff living with Jyotirmoyee Devi as a member of the same family was the best proof of it, it is remarkable that counsel did not put her a single question to test the opportunities she must have had for satisfying herself regarding the mind of the plaintiff during this period, except only to suggest that he would be always kept surrounded by some persons to tell him the names of the visitors who happened to call on him, and also that he could not answer questions owing to his inability to talk Bengali very well. (Vol 8, p 370, ll 13-15 and 31-32) Jyotirmoyee Devi admitted that at Dacca many people would be near the plaintiff, officers and relations or others, but, said she, "they will not tell him things", "we would answer inquiries made of us and the plaintiff inquiries made of him. It is not a fact that we answered questions put to him" (ibid, p 370, ll 20-21 and ll 29-30)

Biloo, alias Jitendra Chandra Mukherjee, P W 938, a son of Indumoyee Devi, also said

"After the *atma-parichay*, his conversation till now showed not that he was playing a part, but that he was the *Mejo Mama* (mother's second brother). If his conversations showed that he was anybody else, we would have whipped him out of the house" (Vol 10, p 342, ll 24-27)

Here, again, cross-examination was singularly lacking to test the statement so emphatically made by the witness.

IDENTITY NOT INFERRED FROM BARE RESEMBLANCE

In dealing with the direct evidence of identity, it is, I repeat, not a fact that the learned judge relied only on recognition by Jyotirmoyee Devi or Ram Satyabhama Devi, or that he relied on bare recognition unsupported by other facts. He had very correctly set the problem before him in the words of one of the defence witnesses, Jaha Bux, D W 336 (Vol 16, pp 121-122)

"Q—You saw at a glance that he was not the second Kumar?"

A—One could not see that at a glance. Hence I had a long and good look at him. I told him (i.e., the defence pleader who had taken the statement) a glance was not enough to show that I told him I had decided he was not the second Kumar after taking a good and long look at him, and not at first sight.

Q—How does he strike you at first sight?

A—At first sight he seems to be the same man

An answer which of course blew up at once the "utter dissimilarity" theory of the defendants, but still, as the learned judge says, pointedly put the question before the court which it was called upon to decide

"Is this the same man, whatever the degree of resemblance?" (*Vol 18, p 132, ll 1-2*)

In other words, identity was not to be inferred from bare resemblance only, because utter dissimilarity was gone

QUESTION BEFORE THE COURT

As the learned judge put it

"I do not agree that the court has to decide between two alternatives, total dissimilarity and identity. The court will have to decide whether it is identity or stops short of it whether the witnesses belonging to all ranks and conditions of life, and of whom there would be no end except for the limit imposed with consent, have been misled by resemblance, or whether they came because he is the same man. Fortunately the court will not have to decide between this mass of evidence and what evidence the other side have produced, by the credibility of the witnesses alone. There are the marks on the plaintiff's body, and there are the photos" (*ibid, p 132, ll 29-30 and p 133, ll 4-12*)

EVIDENCE OF RECOGNITION ANALYSED

It is true that the court below did not find it possible to deal individually with each of the witnesses of recognition of whom there were no less than 967 on the plaintiff's side, but it classified them into various categories, and considered the evidence of some of them under broad heads as typical of the rest, the tenant witnesses alone numbering no less than 473 (*ibid, p 133, ll 14-40*)

It is wrong to suppose that the learned judge ignored the tenant witnesses altogether. He does in fact deal with them, though only in a general way, and though, with his usual fairness, he says that "in the circumstances of this case, it would be impossible to rest one's conclusion upon their testimony, unless the identity otherwise appears, so long as it is explicable by a sense of loyalty to the old house and by a measure of resemblance enough to deceive" (*ibid, p 131, ll 16-19*). There can be no question, however, that he believes the witnesses, who, he says, are "substantial cultivators", and who, in his opinion, "are not discredited by the fact that they cannot analyse or describe" (*ibid, p 130, ll 25-28*). This is also shown by another fact to which he refers, namely, that they came to depose notwithstanding all the efforts of Rai Sahib Jogendra Nath Banerjee and other myrmidons of the estate to shut out and suborn evidence on behalf of the plaintiff (*ibid, p 129, l 24—p 130, l 25*),—a disgraceful chapter in the history of the case which I have had occasion to advert to earlier in my judgment.

The defendants also called tenant witnesses to support their fiction of "utter dissimilarity", but as the learned judge very rightly points out, they were, generally speaking, the product of Rai Sahib Jogendra Nath Banerjee's "sample letter" to which he refers (*ibid*, p 130, ll 17-19 and p 158, ll 9-22)

As regards other witnesses of recognition, the learned judge put them into two classes

- (i) those who certainly knew the Kumar and could not possibly mistake him, whatever their credit, and
- (ii) those whose credit was unquestionable, but whose recollection of the second Kumar might be open to question (*ibid*, p 133, ll 37-40)

TESTS FOR APPRAISING SUCH EVIDENCE

In the case of these witnesses, again, it will be seen that where their testimony amounted to no more than bare recognition, or "belief without recognition", as the learned judge would like to put it (*ibid*, p 156, l 30), it was accepted only for the purpose of excluding total dissimilarity, but the "recognition" which he was prepared to accept and act on as evidence of identity went very much beyond mere "belief" caused only by sameness of physical appearance

In appraising the evidence of recognition, the learned judge was not at all unmindful of the circumstances which, as Mr Chaudhuri rightly points out, might tend to introduce an element of infirmity into this class of evidence, even where it was perfectly honest. Thus, in the words of learned counsel—

- (i) the belief in identity might be induced by propaganda, public opinion and the knowledge that the claimant had already been accepted by near relatives,
- (ii) lapse of years might have brought about an alteration in the features so as to make genuine recognition impossible,
- (iii) necessary powers of observation might be lacking in the observer and his critical faculties might be weak,
- (iv) the witness might have had inadequate opportunities of seeing the original man, or his recollection might be vague or misleading, and
- (v) judgment might be paralysed and an illusion produced by the common weakness of the human mind for romance, or the common desire to side with the majority, or the common failing to show off or excel by identifying a long-lost person

RECOGNITION BY FAMILY MEMBERS

Trite as these observations are, it is still obvious that recognition by members of the family stands on quite a different footing from recognition by friends and outsiders, and the chances of error would certainly be much less in the case of the former, as there would be no question of propaganda or public opinion to influence their judgment, none certainly of their oppor-

tunities of having seen the original man being brief or inadequate, though their recognition might conceivably be induced by self-deception or a proneness to believe that to be a fact which they wished to believe

The probability of such delusion or wishful thinking on the part of Jyotirmoyee Devi or other near relations was, however, minimised by the defendants themselves by their strenuous denial of the existence of a rumour that the second Kumar had been still living, but the learned judge was all the same fully alive to this, and carefully guarded himself against supposing that because these relatives thought that the plaintiff was the Kumar, that should be sufficient. Referring to the *atma-parichay* and to the action of the family in accepting the plaintiff as the Kumar, he in fact said that despite the utter dissimilarity theory, the court would still have to consider "*whether some resemblance aided by the emotions of the women had not produced the trick, and wish had not become the father to the thought*" (Vol 18, p 87, ll 30-32). As he put it still more forcefully —

"The point, however, is whether the sister or the children of the other sister and her own did in fact recognise him, the plaintiff, that day, although he said he was (?) the Kumar, or whether he, a Punjabi, was induced to say that, with knowledge that he was a different man, with the mad hope that he, looking different as defendants would have it,—or looking similar, if I make a case for them to reduce the absurdity,—will pass as the second Kumar, or whether wish was so much father to the thought that the lady, without recognition, hugged the idea and deceived herself" (*ibid*, p 91, l 41—p 92, l 4)

RECOGNITION BY OTHERS

In regard to the evidence of other recognition witnesses also, the learned judge never allowed himself to forget that mere recognition was at best a matter of opinion, of belief or dis-belief, admitting of honest mistake, which might be induced by a variety of factors. The very classification of the witnesses which he made (*ibid*, p 133, ll 37-40), and the way in which he distinguished between one witness and another, or between one class of witnesses and another, show indeed the caution and discrimination he exercised in accepting this body of oral testimony as evidence of identity. He expressly stated that the effect of propaganda had to be kept in mind in estimating this evidence (*ibid*, p 113, ll 35-37), and in the case of the tenant witnesses, as already pointed out, he did not lose sight of the possibility that their evidence might be explicable "by a sense of loyalty to the old house, and by a measure of resemblance enough to deceive" (*ibid*, p 131, ll 18-19).

JUDGE'S CAUTIOUS APPROACH

Mr Chandhuri referred to the case of Adolph Beck (*Notable British Trials*, p 205) before the lower court, as he did before us, to illustrate the risk of mistake to which evidence of identity was subject, but this was not overlooked by the learned judge at all. "I recognise this risk", says he, "despite his (plaintiff's) total dissimilarity, but the witnesses before me had not seen the Kumar casually, but seen or known him as one sees or

knows a co-villager, or a fellow citizen in this country, at his home or town residence, *a familiar figure, of a known family and striking appearance*, on horse-back or tum-tum or, elephant-back in the roads of Jaidebpur or streets of Dacca" (*ibid*, p 145, ll 20-27)

One or two further quotations will perhaps suffice to show how careful indeed the learned judge was to avoid placing the evidence of any of these witnesses on a higher basis than ought to be done. Thus, for instance, referring to P W 908, Kah Mohon Sen (*Vol 10, pp 176-187*), a retired Deputy Magistrate, he says that "although he is good enough to disavow of the utter dissimilarity theory, on a question of identity one would hesitate to act on his evidence" (*Vol 18, p 151, ll 40-41*). Then, again, he quite frankly states that he does not think that all the railway servants of Jaidebpur or Dacca were competent to give "reassuring evidence" on the question of identity (*ibid*, p 153, ll 4-5), just as, of the numerous witnesses who came from Dacca town itself—shop-keepers, traders, ordinary *bhadralogs*, and men of position—who had seen the Kumar there either at the Nalgola house, or in the streets, or at the stables, or in the river as he would take a plunge into it, or in the famous annual *Janmasthanu missil* (or procession) of Dacca going up and down in his decorated elephant,—he similarly remarks "it will be dangerous to suppose that they are all competent to testify on the identity, if that is a nice question" (*ibid*, p 154, ll 39-40), though he certainly accepts their evidence as well as that of the tenant witnesses to counter the defence suggestion that the Kumar was an "invisible aristocrat" (*ibid*, p 128, l 45 and p 130, l 32—p 131, l 13), or like Adolph Beck, "an obscure man in London casually seen for a day, and then later confused with another, looking like him, and equally obscure and commonplace" (*ibid*, p 154, ll 41-43).

NOT A VICTIM OF "HYPNOTISM"

If, then, anything like a fair view is taken of the learned judge's approach to the evidence of recognition, or of his treatment of such evidence, it seems to be impossible to quarrel with his statement that "the best proof of identity is recognition", the next best thing being "inference of identity from evidence, without recognition" (*ibid*, p 128, ll 17-19), and yet Mr Chandhuri has thought it fit to cavil at the statement as an *ipse dixit* "entirely opposed to common sense, experience, human psychology and the opinion of the highest judicial authorities"! Ponderous words these, but if one may borrow again counsel's own expression, the view he propounds is "amusing in its childishness"! The recognition which the learned judge spoke of and had in view was not the sort of recognition which might be explained away by self-deception or by the common gullibility of large sections of the public, but recognition which stood the test of acutiny as being free from all reasonable chance of fraud or error. This no doubt was an extraordinary case in which persons were claiming to recognise a man who had not been seen or heard of for years, and who sprang up all on a sudden as if from the dead, and recognition was inevitably attended with more than the usual risks and difficulties, but there is no reason to suppose that the learned judge was forgetful of these, or let himself fall an easy victim to a certain hypnotism,—the last in fact, as it was suggested, in a process which is supposed to have begun with the plaintiff casting a spell over Jyotirmoyee Devi and thus lay in her turn over the rest of the world—Bibhabati and Satyendra of the one part, and Saibalmi and Phani Banerjee of the other, alone excepted!

It is misleading to say, as Mr Chandhuri sought to make out, that the learned judge founded on mere recognition, treating body and mind merely as elements which might displace identity, not as a necessary part of the evidence of identity. Equally futile is the other contention that recognition of the plaintiff as the second Kumar in the circumstances and at the date it is said to have taken place could not possibly be free from error or the chance of error, however honest the witnesses.

So far, at any rate, as the near relatives are concerned, I should like to emphasise once again that supposing even the extremely unlikely event of their being in error in respect of the bodily features, they could not possibly have gone wrong in recognising the identity of the mind. As Lord Chief Justice Cockburn observed in his summing up in the Tichborne trial—"One man may resemble another. There have been such instances in the world, or imposture would never have been attempted. No man attempts to personate another who does not more or less resemble him (a fact, by the way, which the propounders of the "utter dissimilarity" theory completely forgot). But no two men were alike *within*. If there could be two alike, to begin with, the mind and memory would very soon cease to be the same, for since the Creation no two lives were ever the same, and therefore no two men were ever the same."

RELATIONS WHO RECOGNISED

In the Tichborne trial all the members of the family except the mother were at one in denying the identity of the claimant, and the mother herself, if she was not the victim of an insane delusion, was still obsessed with a belief as to the survival of her son from which she was determined not to be shaken by any consideration, however strong. Here on the other hand it was all different. *In this case all the relations, except only a few, gave evidence supporting the identity of the plaintiff*, of which the learned judge gives a list (Vol 18, pp 142-143), including two sisters and one brother of Rani Bilasmoni, three sons of Rani Satyabbama's brother, a step-son and a cousin of Kripamoyee Devi (sister of Raja Rajendra Narayan Roy), a son of Indumoyee Devi, two sons-in-law of Jyotirmoyee Devi, and a mother's sister of Phani Bhusan Banerjee, not to mention more distant relations. They even included a first cousin of the second Rani herself, Pura Sundari Devi (Vol 4, pp 206-217), and a maternal aunt, Sarojini Devi, P W 1026 (Vol 12, pp 28-38), being the daughter and the surviving widow respectively of Pratap Narayan Mukherjee, a maternal uncle of Bibhabati Devi. Among the exceptions was another cousin of the second Rani, Sukumari Devi, *alias* Alta Devi, D W 280 (Vol 15, pp 269-279), daughter of Pratap Narayan's brother Ram Narayan Mukherjee, who had seen the Kumar when she was barely 15, but her denial of the plaintiff, as the learned judge points out, went perilously near admission (Vol 18, p 180, ll 12-14). The other relations who would not recognise the plaintiff were the second Rani herself, and from her side, her brother Satyendra and her cousin Shyamadas Banerjee (Vol 1, pp 255-278), while from the Kumar's side, these were D W 92, Phani Bhusan Banerjee (Vol 14, pp 104-228), his sister Sabalini Devi (Vol 3, pp 436-472) and the Chota Rani, D W 94, Ananda Kumari Devi (Vol 14, pp 19-95).

Very rightly does the learned judge comment on the fact that there was no other witness from Uttarpara from among the second Rani's own people, her two other maternal aunts, the widows of Suryya Narain and

Ram Narain Mukherjee, were still living (*Vol 12, p 281, ll 38-39, Surayanarain's widow alive*), but they were not called by the defendants (*Vol 18, p 180, ll 11-12 and 15-16*)

Tarinnmoyee Devi, the youngest sister of the Kumar, was cited by the defendants but not called, neither was she examined as a witness for the plaintiff, but it is idle to pretend that she repudiated the plaintiff, or that her husband Brojolal issued a notice declaring that the plaintiff was an impostor, as was suggested to P W 5, Suresh Chandra Mukherjee in cross-examination (*Vol 4, p 68, ll 38-39*) It was the defence case from the beginning that the plaintiff was being sponsored by all the sisters, the defendant No 4, Ananda Kumari Devi, actually stating in her pleading that the sisters and the sisters' sons had set up the plaintiff as the second Kumar (*Vol 1, p 187, ll 36-40*) Brojolal, it will be remembered, was actually writing to Jyotirmoyee Devi on the 27th May, 1921, asking her to come to Dacca once with the "Kumar" (*Ex 45, Vol II, p 312*), which certainly does not look like his treating the plaintiff as an impostor The learned judge has dealt with the matter fully, and I need not repeat his observations (*Vol 18, p 182, l 18—p 183, l 17*)

It is also a significant fact to which the learned judge calls attention that to support their denial of the plaintiff's identity, the defendants were practically unable to produce a single independent disinterested man of position who had known the Kumar in life, still remembered him and could not possibly make a mistake (*ibid, p 180, l 16-20*), though one should have expected a stream of such witnesses to come forward if the plaintiff was not really the second Kumar Unlike the claimant to the Tichborne estate, the plaintiff here kept himself open and accessible to all, no prior appointment being necessary for an interview with him he was freely mixing with people, attending parties and functions, and in fact inviting and challenging recognition all round without restraint, and yet while the evidence from the plaintiff's side came flooding in till the tide had to be checked by a voluntary effort, the defendants, on the other hand, found themselves almost landed high and dry on barren sands of half-truths and untruths

LACK OF INDEPENDENT WITNESSES ON DEFENDANTS' SIDE

Hard as it is to believe, learned counsel for the defendants actually tried to lay the blame at the door of the trial judge for this hopeless failure on the part of his clients to offer independent evidence in support of their case He solemnly suggested that the judge permitted the defence witnesses to be subjected to "gross and baseless allegations of drunkenness, illicit amour and sodomy" to which no respectable person would willingly expose himself, and that it was partly for this reason that witnesses kept away from the box, it being almost certain that the judge would afford them no protection against such insulting cross-examination All that I can say is that no viler or more unfounded accusation could be made from the Bar against the Bench, and I am amazed that counsel of the position of Mr Chaudhuri should have forgotten himself to this extent It does not appear that this fear of insult in the witness box had kept back a single individual among the numerous witnesses whom the defendants actually called at the trial A counsel who uses slander and vituperation of the judge as a weapon to defend his clients only betrays the weakness of the cause he is out to support

The few independent respectable witnesses whom the defendants have called, like, for instance, Lt-Col Pulley, D W 1 (*Vol 5, pp 124-150*), J T

Rankin, ICS (retired), D W 2 (*Vol 12, pp 81-99*), K C De, ICS. (retired), D W 52 (*Vol 13, pp 103-125*) and J N Gupta, ICS (retired), (*Vol 13, pp 27-30*), gave evidence which is really valueless on the question of identity

ELEMENTS IN REAL RECOGNITION

In weighing the evidence of identity given by the plaintiff's witnesses of recognition as against that of non-identity coming from the other side, it should not be forgotten that the important thing to keep in view is not merely what opportunities the witnesses had of acquainting themselves with the second Kumar before his disappearance, but also to what extent they made themselves competent by observation and association to form a judgment about the plaintiff himself, but if I am not mistaken, this is a consideration which learned counsel for the defendants somewhat appeared to overlook. Otherwise he would not have complained that there was no "spontaneity" in the recognition on the part of the plaintiff's witnesses. Real recognition, according to him, is a kind of instinctive impression made upon the mind through a perception of identity, whereas an inference from a comparison of common points or other facts is not recognition, but the result of an exercise in observation and mental argument. If, therefore, in a given case the first has to depend for its acceptability on the second, then it has no independent value at all and may well be put on one side. The learned judge, he says, does not consider whether the recognition spoken of by the witnesses was real recognition in this sense based on mere impression, or an inference of identity from other data. It seems to me that this is no more than an objection to the classification of the evidence, not to its acceptance, and I should have thought that recognition when it was founded on reflection and judgment possessed a much higher value than mere casual impression from physical appearance. The circumstance which according to learned counsel constitutes an element of weakness helps in my opinion only to place the evidence on a surer and stronger basis. Several of plaintiff's witnesses, it will be seen, not all, say that their first inclination was to treat the plaintiff as an impostor, but though they came as unbelievers, they stayed to be converted, a fact which certainly goes to lend an added assurance to their opinion. There were others of course with whom recognition was of an instant character.

Mr Chaudhuri forgets that it is such "spontaneous" recognition which in fact is more liable to error, however honest it may be, and that is why, as I have pointed out before, the learned judge put before himself the question—Is the plaintiff really the same man, despite any superficial physical resemblance?

If "spontaneous" recognition is thus not always a very safe ground for deducing identity, "spontaneity" of non-recognition must be even less reassuring as evidence of non-identity, and it will in fact be utterly worthless when such evidence comes from persons who had only casual opportunities of observing the man whose identity they were disputing.

"SPONTANEITY" OF RECOGNITION AND OF NON-RECOGNITION

It is this fact indeed which to a large extent robs the so-called independent evidence on the defendants' side of all value. Take, for instance,

D W 1, Lt-Col Pulley (*Vol 5, pp 124-150*), whose position as an A D C to the Lieutenant Governor might be supposed to carry weight and authority, but as the learned judge points out, the witness himself shows how limited was his contact with the second Kumar, if he had any contact with him at all. Mr Chaudhuri said that the judge's finding about the witness was "extraordinary", because he took the charitable view that the latter must have unwittingly allowed himself to be misled by the defendants' advisers, but the only other alternative would be to say that he was a deliberate perjurer. I may say that I fully accept the learned judge's criticism of this evidence, and hold it as absolutely valueless on the question of identity (*Vol 18, p 164, l 38—p 167, l 2*).

Take, again, J N Gupta, ICS (retired) (*Vol 13, pp 27-30*), about whose respectability there could be no question, but he saw the second Kumar together with his brothers only once in 1908 when a friend took him out on a shoot with them, and they were all in *shikar* dress, and he saw the plaintiff in 1925 when he had only "one or two minutes" talk with him (*ibid, p 29, ll 11-12*). As a witness of non-identity, he was obviously useless, even if no importance be attached to his off-hand opinion that the plaintiff had "some general similarity" with the Kumar he had seen before (*ibid, p 29, ll 18-19*). The learned judge, I hold, took an entirely correct view of his evidence (*Vol 18, p 167, ll 3-22*).

I do not find it necessary to refer to the other defence witnesses coming within this category. Suffice it to say that I fully agree with the learned judge in his observations regarding their evidence, which I may add are characterised by the utmost fairness.

As regards witnesses like J T Rankin (*Vol 12, pp 81-99*), or H C F Meyer (*Vol 3, pp 335-369*), or Mrs Meyer (*Vol 3, pp 372-373*), or Sarada Prasanna Ghose (*Vol 2, pp 272-293*), persons who undoubtedly had seen and known the second Kumar, the learned judge has given his reasons fully why he is still unable to accept their evidence on the question of identity, and I deem it enough to state that I entirely concur with him, notwithstanding Mr Chaudhuri's criticisms (*Vol 18, p 177, l 41—p 179, l 22, p 170, l 4—p 171, l 8, p 171, ll 9-34 and p 176, l 12—p 177, l 40*).

DENIAL OF IDENTITY BY SECOND RANI

It is perhaps, however, necessary to say a few words regarding the denial of identity by the second Rani, who cannot certainly be dismissed as an incompetent witness on the point, having had passed seven years of married life, if not of married bliss, with the second Kumar. She doubtless had an opportunity of forming an idea about his physical appearance, and might be expected to be able to recognise her husband if she saw him after an absence of even 15 years, though, curiously enough, but perhaps not unnaturally, she failed to recognise him in an admitted photograph of his (*Ex XL, Photo Album, Vol III, p 2*), said to have been taken at the age of 14 (*Vol 12, p 294, ll 12-14 and p 312, ll 11-14*),—a fact, by the way, which the learned judge finds it necessary to notice in order to refute Mr Chaudhuri's contention that one ought to be able to see at a glance the same individual in several photos taken at different periods of his life, whether one did or did not know the man all through (*Vol 18, p 127, l 46—p 128, l 1*). But so far as the plaintiff was concerned, it was impossible for the second Rani to approach the question of his identity with an open mind rightly or

wrongly, as she makes it perfectly clear in her evidence, she had committed herself irrevocably to the position that her husband had died and his body had been cremated at Darjeeling, and she could not but regard any other person claiming to be the second Kumar as an impostor, however overpowering the physical resemblance might be between the two

She had seen the plaintiff in court on the day her deposition commenced, and when she was asked in cross-examination if she had particularly noticed at the time the features of the face—nose, eyes, eye-brows, lips and ears—she gave a characteristic answer “I noticed them, *not with the idea of finding out whether they are like Mejo Kumar’s*, but with the idea of finding out what they are like in him (plaintiff)” (Vol 12, p 294, l 29—p 295, l 5)

She had seen the plaintiff also at other places—on the first few occasions from the portico of her house in Lansdowne Road some three years after his arrival, as he drove past in a phaeton with Budhu seated by him (*ibid*, p 264, l 23—p 265, l 11), and later several times, near the Victoria Memorial on the *maidan* and in the Strand near the Eden Gardens (*ibid*, p 268, l 32—p 269, l 22) She saw him again in November, 1934, in College Square as she was passing along, when the plaintiff’s car happened to drive up alongside hers owing to a traffic hold-up (*ibid*, p 214, ll 31-37) She had, however, never heard the plaintiff speak, nor spoken to him (*ibid*, p 294, ll 27-28) At the Victoria Memorial she had “the best look” at the plaintiff, as the plaintiff had also a “keen” look at her, the wheels of her landau almost touching those of the plaintiff’s phaeton (*ibid*, p 269, ll 16-22)

These chance encounters between the second Rani and the plaintiff, if they were a fact, might doubtless be supposed to have given her sufficient opportunities of recognition or non-recognition, as on her own statement the plaintiff had never tried to hide his face (*ibid*, p 270, ll 4-7), but then she never felt the necessity of seeing the plaintiff with a view to resolving any doubt in her mind as to his identity

ALREADY COMMITTED

She in fact made her position quite clear to her husband’s mother’s sister, Sudhangshu Bala Devi, one of the plaintiff’s witnesses of identity (Vol 2, pp 230-248) Admittedly, this lady paid the second Rani a visit at her house in Lansdowne Road in order to request her to “see the plaintiff once” and satisfy herself personally, but what was the second Rani’s reply? “*What shall I do on seeing him?* I have heard from my brother and from others that he is not the same man, he is a Punjabee He has come in the guise of a sadhu only for the purpose of getting hold of the Raj Estate” (*ibid*, p 233, ll 22-27) Bibhabati herself gives a not very different account of the interview in her examination-in-chief According to her, Sudhangsu Bala said “This sadhu who was come—why don’t you see him once?” She replied “If it were necessary to see him, would I wait till she spoke?” She added “Besides that, I have seen him” Sudhangsu Bala was herself a widow, and knew her lot, and knowing that, how could she possibly make such a request? (Vol 12, p 214, ll 21-28) There lies the key to her whole attitude in the matter of recognition or non-recognition *What should she do on seeing the plaintiff?*

It is no wonder that when Rani Satyabhama Devi sent her a registered letter on the 21st July, 1922, imploring her “with all affection” to come to Dacca and “reveal the truth” for herself (Ex 58, Vol II, pp 431-432),

the second Rani refused to accept the letter,—giving it as her explanation that “the registered post frightened her”, and she feared that this might be a move on the part of the old lady who had been keeping the plaintiff in her house to obtain a “receipt” from her, whatever that might mean! (Vol 12 p 219, ll 18-22) PW 937, Abinash Chandra Mukherjee, an employee of Rani Satyabhama, proves that he had written the letter under her instructions (Vol 10, p 293, ll 41-43)

After all this, one does not know if any importance whatever can attach to Bibhabati's denial of the plaintiff's identity to her the question was not an open one at all, and not only did she not have any use for investigating the matter for herself, but she studiously abstained from all enquiry she had met the plaintiff several times here and there, but the meetings were “accidental” and not of her seeking (Vol 12, p 270, l 38 and p 271, ll 4-5), and if she had a view of the face on such occasions, at close quarters or otherwise, it awakened in her no desire, not even a curiosity, to see whether it bore a resemblance to that of her husband. Conduct like this would doubtless be just as one should expect of a Hindu lady who knew of a certainty that her husband was dead, but then it would rob her statement that the plaintiff was not her husband of any independent value which it might otherwise be supposed to possess, and in any case it could not outweigh the positive testimony of the sister or the grandmother or other members of the family who affirmed and were in a position to affirm the identity of their long-lost relation, not only from what they had seen of the bodily features, but from the opportunities they had of examining the mind in the intimate intercourse of family life

DENIAL OF RANI SATYABHAMA DEVI'S RECOGNITION

The second Rani went the length of denying that Rani Satyabhama Devi had accepted the plaintiff “I don't believe that she had accepted the plaintiff as her second grandson” (Vol 12, p 266, ll 13-14) She had of course made no enquiries of the old Rani herself, but heard about it from people coming from Jaidebpur (*ibid*, p 266, ll 23-28), she was repeatedly asked if she had found the necessity of enquiring from her direct, but would not give a straight answer (*ibid*, p 266, ll 29-35), finally adding, somewhat inconsistently “For I knew if I sent to her, I would not get her real opinion” (*ibid*, l 36) she knew that “those who were setting up the plaintiff had great influence over the Rani and she could never rise above that influence” (*ibid*, p 267, ll 3-4) She actually suggested that Rani Satyabhama Devi was herself unwilling to come to Dacca to live with the plaintiff in the same house, but had been forced to do so by Jyotirmoyee Devi and the sister's sons, though all this was hearsay (*ibid*, p 267, ll 32-33)

Like her counsel, Bibhabati Devi really took up an impossible position regarding this matter. There can be no doubt that Rani Satyabhama Devi had for a fact accepted the plaintiff as her grandson, admitting him into the intimacies of her family as such, and the defendants knew it as well, otherwise they should not have been at so much pains to establish that the old lady was in her dotage, suffering from impaired eye-sight and otherwise incapable of forming an independent judgment, as Bibhabati herself sought to make out (*ibid*, p 267, ll 19-21 and p 282, ll 17-25) The reason why the latter was still struggling hard to deny this fact is not far to seek. She knew that no lady of position and respectability would live in the same

house with a stranger she would not do such a thing herself even at her brother's request, and could not conceive of her mother or grand-mother doing so either (*ibid*, p 267, l 36—p 268, l 4)

That is why she began first with a false denial, and then with a qualified statement—"I know very well that she (Rani Satyabhama) *did not altogether accept* the plaintiff as the second Kumar, but had her suspicion" (*ibid*, p 267, ll 26-27), and an attempt, equally false, to find an explanation for the fact of acceptance. She had not the courage to impute dishonesty to the Rani. "Then you are not imputing dishonesty to her—not saying that she was falsely and dishonestly accepting the plaintiff?"—"I don't want to say that" (*ibid*, p 283, ll 37-39)

RANI SATYABHAMA DEVI'S LETTER TO COLLECTOR

Bibhabati admits that when Rani Satyabhama accepted the plaintiff, the other side began to say that she had lost her eye-sight and her faculties (*ibid*, p 282, ll 17-19), and it appears that because of such talk the Rani got her vision tested by Lt Col M McKelvie, I.M.S., Civil Surgeon of Dacca, on the 20th July, 1922, who certified that for her age (said to be about 90) her vision was good and she was able to count the test dots and recognise faces (*Ex 74, Vol II, p 427*). On the 29th July following she also wrote to the Collector of the District, J G Drummond, asking for an enquiry into the plaintiff's identity in imploring terms, and in this letter (*Ex 274, Vol II, pp 428-430*) she said that to make sure that in her old age there was no defect in her vision and her eyes had not deceived her, she had got herself examined by the Civil Surgeon. Her recognition of her grand-son, she maintained, could not, therefore, be an illusion, and lest there should be still any suspicion about it, she asked that Mrs Drummond might "kindly condescend" to come over to her place once and see her herself and report to him about her physical condition (*ibid*, p 430, ll 4-12)

The original letter was called for by the plaintiff by a petition dated the 6th September, 1934 (*Vol 10, p 123, l 28—p 124, l 16*), but it was not forthcoming, and a true copy was accordingly proved by P W 959, Bibhuti, *alias* Chandra Sekhar Banerjee, son-in-law of Jyotirmoyee Devi (*Vol 11, p 34, ll 3-10*), cross-examination on the point being declined. Bibhabati, although she did not pretend to have any knowledge about this letter, had still no difficulty in suggesting that it could not have been written by Rani Satyabhama herself, but must have been caused to be sent by "those behind her" (*Vol 12, p 283, ll 25-26*), by which she meant Jyotirmoyee and her sons and the sons of Indumoyee (*ibid*, p 282, ll 6-7). That was also the suggestion of her learned counsel, but its puerility is self-evident: it would only show that those who had contrived this letter were so sure of the Rani's eye-sight and faculties, physical and mental, that they were prepared to face the risk of Mrs Drummond coming to examine the lady herself, and they also took the risk of being found out by the Rani as having done something behind her back in case the Collector's wife happened to turn up. It is idle to say that the letter might not have been actually sent to Drummond: there is Bibhuti's unequivocal statement that the copy produced was a correct copy of "the letter sent by Satyabhama Devi to the Collector", and as already pointed out, there was no cross-examination of the witness. Apart from the medical certificate, there was reliable oral evidence on the plaintiff's side regarding the Rani's faculties and eye-sight, and I see no reason to disagree with the

trial judge in his estimate of this evidence, or, I may add, in his conclusions on the whole question of Ram Satyabhama's conduct (*Vol 18, pp 116-119 and pp 181-182*)

NATURE AND CHARACTER OF PLAINTIFF'S EVIDENCE OF RECOGNITION

I do not think it necessary, and it would in fact be wearisome, to deal individually with each of the numerous witnesses who have been examined on the one side or the other on the question of recognition, and deem it enough to state that in my opinion the defendants have wholly failed to shake or displace the evidence which the plaintiff has adduced in support of his case on this head. I am not prepared to sweep aside this strong body of respectable and reputable testimony, and to hold, as Mr Chandhuri invites us to do, that it is either perjured or mistaken evidence. Men of standing and position, unconnected with the family and with no ulterior interest to serve, who had seen the Kumar in life, and also the plaintiff, and might be trusted to have been able to form a competent judgment, hard-headed men not shown to be given to romancing or hable as to be swept off their feet by false propaganda or pre-conceived notions, have all come forward to give evidence in favour of the plaintiff, and they cannot be summarily dismissed either as a set of knaves or as a set of fools in the clutches of a knave. Nor is it possible to dispose of the whole body of relatives and kinsmen—sister, sister-in-law, sisters' sons, grand-mother, mother's sisters, mother's brother, cousins, wife's cousin and wife's mother's sister, not to mention others more distantly connected—by saying that they had all entered, or been led to enter, into a gigantic conspiracy to compass the moral and financial ruin of a daughter-in-law of the house against whom they bore no grudge or spite, by invading the sanctity of her widowed life on the one hand and depriving her of her estate on the other.

CONTRAST WITH DEFENCE EVIDENCE

No one will, and the learned judge does not, for a moment pretend that the same degree of value attaches to the testimony of each witness, or class of witnesses, on the plaintiff's side, but in vivid contrast to the whole mass of the plaintiff's evidence stands on the one hand the body of defence witnesses who pledged themselves with thoughtless complacency to the theory of "utter dissimilarity", and on the other, the small group of disinterested and respectable persons produced by the defendants, who on their own showing proved their utter incompetence to speak to identity with any assurance,—with just a few thrown in, who, though competent, could not yet be trusted to give unbiassed, or wholly unbiassed, evidence.

DEFENCE THEORY OF "UTTER DISSIMILARITY"

Thus alleged absence of any likeness between the plaintiff and the second Kumar to which witness after witness was speaking, parrot-like, on the defendants' side must doubtless have been an utter fiction, resorted to, it seems, only to discount the plaintiff's story as to his having been suspected, if not recognised, to be the second Kumar while at Buckland Bund, a story which might be supposed to lend support to the rumour so strongly relied

on by the plaintiff, and equally stoutly denied by the defendants, that the Kumar was living

A MERE FICTION TO DISCOUNT STORY OF RUMOUR

The rumour, as is obvious and as the learned judge himself points out, could not prove the truth of its contents (*Vol 18, p 49, ll 38-39 and p 51, ll 7-8*), and it could no more establish identity than prove that the body of the Kumar had not been cremated. All the same, the existence of the rumour was itself a fact of which the relevancy could not be questioned as tending to explain a relevant fact, and it was certainly capable of being proved, as in fact it was proved by hundreds of witnesses on the plaintiff's side speaking to it, witnesses whose evidence on the point the learned judge has accepted (*ibid, p 51, ll 30-33*) and I also see no reason to reject. The plaintiff's case on this point certainly receives strong support from a document on which the defendants themselves rely (*Ex Z(33), Vol II, pp 175-176*), Rani Satyabhama Devi's letter to the Maharajadhiraj of Burdwan of the 3rd September, 1917, in which she expressly referred to a rumour said to have been current in various parts of Bengal to the effect that her second grand-son had been rescued by sannyasi from the cremation ground at Darjeeling, and was still living as a recluse with them. It is not impossible, but difficult to believe, that such a rumour could have started all on a sudden 8 years after the supposed death of the Kumar, or that any credence could have been attached to it by the Kumar's people to the extent of making the head of the family write to the Maharajadhiraj of Burdwan, unless there had been a similar rumour or rumours from before. To my mind the letter undoubtedly furnishes an additional ground for accepting the positive testimony of the plaintiff's witnesses who spoke of rumours from 1909.

To discredit the plaintiff's story, Mr Chaudhuri referred to the lack of consistency in the evidence regarding the form or contents of the rumour, but it is common knowledge that a rumour, though it may arise from facts, hardly ever conforms thereto, and it is its characteristic to be assuming different shapes at different times as in every ear it spreads, on every tongue it grows. The varying forms which the witnesses gave to the rumour as they heard it seem only to confirm the truth of their testimony that the rumour existed as a fact.

The existence of an antecedent rumour of some kind was in fact implied in a question which was put by Mr Chaudhuri himself to Jyotirmoyee Devi touching the visit of the *mouni sannyasi* to Jaidehpur in 1917. This visit which was spoken to by Jyotirmoyee Devi (*Vol 8, p 294, l 36—p 295, l 2*) is admitted by the defendants, and they say in fact that this was the genesis of the rumour which led to the writing by Rani Satyabhama of her letter to the Maharajadhiraj of Burdwan. Mr Chaudhuri asked

"Q—Did you all say that the *mouni sannyasi* who had come was very much like the second Kumar in appearance?" (*ibid, p 339, ll 20-21*)

Jyotirmoyee's answer was of course an emphatic no, but why should she or any other member of the family have been at all eager to fasten upon this mute ascetic as their long-lost relation, unless a rumour had already laid the germ of a hope in their mind that the second Kumar might be still living?

One should have imagined, as the learned judge points out (*Vol 18, p 67, ll 34-37*), that the defendants would concede the rumour, and concede also a superficial resemblance between the plaintiff and the Kumar, in order to get a background for the supposed action of Jyotirmoyee Devi in running an impostor to play the role of her second brother, but the fact remains, they fought shy of either, even as falsehood fights shy of truth, its greatest enemy

AN ABSURD EXPLANATION

It is not to be supposed that the defendants did not realise the absurdity involved in this attempt to deny the least trace of similarity between the plaintiff and the second Kumar, and one can easily understand, therefore, why learned counsel on their behalf should have tried to avoid committing himself to a definite case on the point, until, pressed by the court, he could do so no longer, and ultimately had to find himself fixed on the horns of a dilemma

As early as the 8th January, 1934, learned counsel for the plaintiff in fact enquired, in view of the variation in the cross-examination from after P W 5, Snresh Chandra Mukherjee (*Vol 4, pp 44-54*), whether the defendants still maintained that the plaintiff was totally dissimilar in appearance to the second Kumar. Mr Chaudhuri's reply was that his case was in the written statements, and that he would state it more fully in his opening (*vide Order No 500 dated 8-1-34, Vol 1, p 32*). Nothing, however, was to be found in the pleadings, and it appears that the trial court had to elicit it from counsel by a specific question in the course of his opening. The learned judge took it down in Mr Chaudhuri's own words as he put it then

"They are not so utterly different that any body who says that they are the same necessarily gave false evidence"—

a remarkable toning down of the case put to the plaintiff's witnesses (*Vol 18, p 132, ll 3-28*)

Before us Mr. Chaudhuri repeated his first formula of total dissimilarity, but when it was pointed out to him that the more he emphasised the dissimilarity, even after the plaintiff had stripped himself of his ashes and his beard, the more the difficulties he created for himself, he tried to explain, to put it again in his own words, that all that he wanted to say was that to those who knew the second Kumar intimately, the plaintiff was utterly dissimilar, that is to say, taking the features and the conglomeration of features going to make the face, the two faces were utterly different, but he added that there was yet sufficient resemblance which might deceive the ordinary person who did not know the Kumar intimately or was not an accurate observer. In other words, he said, to those who knew the Kumar intimately deception should not be possible, but those who knew him distantly might be deceived

CONTRADICTED BY DEFENDANTS' PLEADINGS AND EVIDENCE

This was as near an admission of similarity as counsel could induce himself to go, though it was not quite the same thing as saying that there was sufficient similarity, but that it was not such as could mislead the intimate relations. But the admission such as it was went directly against the case

made by his clients in their written statements, and against the evidence of Bibhabati Devi herself, not to speak of the numerous other witnesses, strangers or relations, who had vied with one another in disavowing even a remote resemblance. In paragraph 21 of her written statement (*Vol 1, p 177*) Bibhabati Devi in fact averred as "absolutely false" that "many people recognised and many others guessed the plaintiff as the second Kumar while he was staying on the Buckland Bund, (and) that the relations of the plaintiff and the local zemindars were convinced of his identity and pressed him to declare as such". The Chota Rani, Ananda Kumari Devi, too, in paragraph 6 of her written statement (*ibid, p 186*) made a similar denial of the alleged recognition of the plaintiff by tenants and relations alike. In her evidence Bibhabati Devi was not content with saying, after taking (at her own counsel's request) "a good look" at the plaintiff, that he was not the man who was her husband (*Vol 12, p 196, ll 14-16*), but was positive that no one could possibly mistake the one for the other.

"Q—If anybody says that as between the second Kumar and the plaintiff there is not such difference that a man cannot mistake one for the other, would you agree?

A—No. That would not be at all true.

Q—If anybody says that they look like twins, would you agree?

A—Oh no, on no account.

Q—Or if anybody says that the sight of the plaintiff reminds one of the second Kumar?

A—I would not agree at all.

Q—You say then there is no resemblance between the two?

A—None in my eyes. None that I can see.

Q—If any man, however respectable, says that there is resemblance between the two striking, would you believe him?

A—Not in the least.

Q—If anybody says there is resemblance between the two?

A—I would say there is none" (*ibid, p 285, l 29—p 286, l 8*)

She was reminded about the evidence given by J. T. Rankin, D.W. 2, one of her own witnesses who had specially come out from England to depose in the case, but who unfortunately did not survive to read and sign his deposition as recorded by the court. Witness was asked if he would pledge his oath that those had come and identified the plaintiff as the second Kumar necessarily gave false evidence, and his answer was

"If a person said he might be looking like the second Kumar, he might be telling the truth for aught I know" (*Vol 12, p 84, ll 13-17*),—an honest admission no doubt, enough to rule him out as a witness of non-identity, but which Bibhabati was not prepared to accept as correct evidence.

"Q—Do you agree or disagree with Mr Rankin's testimony that if witnesses have come and sworn to a striking resemblance between the Kumar and the plaintiff, you cannot call such witnesses untruthful?

(*Objected to Allowed*. Witness asks that the question may be explained and she asks it twice.)

Q—Do you say that these witnesses are untruthful?

A—Either untruthful or mistaken—they had lost their memory of the Kumar during this lapse of time" (*Vol 12, p 288, l 35—p 289, l 5*)

CONCESSION OF SLIGHT SIMILARITY IN ARGUMENT—AS INSINCERE AS UNMERITORIOUS

The slight concession of similarity which learned counsel had found it necessary to make in his opening was thus unceremoniously jettisoned by his own client in her evidence. It was a concession which had really no content in it, and I am not at all sure that counsel believed in it himself. Pressed by the court, he could not of course help stating his case, but in so doing, as he explained to us, he took particular care to use the words of Lord Chief Justice Cockburn, not his own, adding with astonishing frankness, if I am quoting him aright, that he was not going to give the learned judge in the most useful anything to catch hold of—for, "if you made an admission, it would be only tied round your neck and you could not get away from it"! The object thus was not to make a statement he meant to stand by, but to avoid making one which he might not be able to get out of! Whatever one might think of this exhibition of unconcealed contempt for the most useful court, there seems little reason to doubt that learned counsel must have felt that an admission of some resemblance, however slight, would be a halter round the neck which would strangle his clients.

In point of fact it is not the admission, but the theory of utter dissimilarity, the absurdity of which it was sought to mitigate by the admission, that must prove the death of the defendants' case. Say what Mr Chaudhuri might, that was the fable with which his clients had started—no resemblance whatever in any respect, and thus the plaintiff stripped bare of all its falsehoods one by one by his evidence, the so-called admission which afterwards came to be made as to points of superficial similarity calculated to deceive, being as insincere as it was unmeritorious.

Mr Chaudhuri wanted to say that he had all along admitted such superficial similarity between the plaintiff and the second Kumar, but according to him, the resemblance did not extend beyond the possession by both of a "fairish complexion" and "brownish hair", if not also of eyes which were "not black", and he was apparently relying on the casual statements of a few of his witnesses mentioning one or more of such common features. This however, certainly fell far short of a case of similarity, superficial or otherwise, such as might tend to deceive anybody, stranger or relation. Neither Mr Chaudhuri nor any of his witnesses would admit a likeness of face or general appearance on any account, and it is difficult in these circumstances to see how mere light complexion or brown hair or light blue eyes, or all of these in combination, might produce any suspicion of resemblance so as to cause one person to be mistaken for the other. None of the witnesses who spoke to these characteristics said in fact that they had been misled thereby into believing that the plaintiff was the second Kumar, but they maintained on the other hand, equally with other witnesses, that the two were wholly unlike each other.

DEFENCE EVIDENCE—A FEW TYPICAL SAMPLES

Thus, to give a typical instance, Jagadish Chandra Chowdhury (*Vol 2, pp 72-112*), a defence witness examined on commission, who had been a

member of the Bhowal Talukdar and Proja Samity for about two months and then left it, as he says, because he realised that the plaintiff was an impostor (*ibid*, p 73, l 32—p 74, l 21), stated in cross-examination that the first day he met the plaintiff, the only similarity he noticed between his appearance and that of the second Kumar was the fair complexion (*ibid*, p 84, ll 19-37), but was careful to add ' "I particularly marked the face which did not tally at all" (*ibid*, p 85, ll 2-3)

Another commission witness, Sarada Prosanna Ghosh (*Vol* 2, pp 272-293), who admittedly had known the second Kumar very intimately, said nothing about complexion or any other peculiarity, but stated generally that he had noticed no similarity between the features of the second Kumar and those of the plaintiff (*ibid*, p 274, ll 14-16), a statement which he repeated in cross-examination with even greater emphasis, saying "I saw that there was no similarity of features in the least" (*ibid*, p 287, l 23) This is the witness who, as the Wards Deputy Collector, had gone through the "telegram of death" from Darjeeling (*ibid*, p 283, ll 34-35), and had also come to know of the second Kumar's death as soon as Bara Kumar had received the telegram (*ibid*, p 280, ll 33-35), and yet could not check his curiosity to go and see the sadhu who was claiming to be the second Kumar in order to make sure whether he was really so (*ibid*, p 286, ll 2-3),—pretending no doubt that he did so "with a judicial frame of mind" (*ibid*, p 286, ll 6-7), having been "neither convinced nor unconvinced" about the death of the second Kumar! (*ibid*, p 286, l 14)

Some commission witnesses in fact specifically denied any likeness in respect of complexion or hair or eyes Thus, for instance, Atul Prosad Roy Chowdhury (*Vol* 3, pp 22-69), on being asked about the distinguishing features in the appearances of the plaintiff and the second Kumar, gave the points of difference thus

"The hair of the second Kumar was brown and the plaintiff's hair is black Eyes of the second Kumar were fairly large and long-drawn, with a "bluish tint" like that of Europeans, and the plaintiff's eyes are small, roundish and somewhat pale

The complexion of the second Kumar was "reddish" like the Englishmen, and that of the plaintiff is white" (*ibid*, p 28, ll 19-25).

All this, be it noted, was in examination-in-chief

Take another commission witness, Durga Prosad Biswas (*Vol* 3, pp 127-158), who was pointedly asked if he meant to say that there was no resemblance at all in respect of complexion, hair, nose, eyes and other features, and the answer was, there was none they were entirely different, and from all these he came to be definitely certain that the plaintiff was not the second Kumar (*ibid*, p 151, ll 1-7)

It is significant that Bibhabati Devi herself insisted on difference in complexion, her counsel's admission notwithstanding

"Q—If anybody says that the second Kumar's complexion was very fair with slight tinge of red, would that be correct?

A—No

Q—If anybody says that between plaintiff's complexion and the second Kumar's complexion there is not such difference that one cannot mistake the one for the other, would you agree?

A—No" (*Vol* 12, p 285, ll 18-24)

It is worth while noticing in this connection that in her examination-in-chief she gave her husband's complexion as "very fair" "with a yellow tinge" (*ibid*, p 200, ll 3-4), but she improved upon it in re-examination by adding that the colour of his face was "sun-burnt" (*ibid*, p 313, ll 26-28), thus coming into line with plaintiff's expert witness, P W 544, Jamini Prakash Ganguly, the artist and painter, who, describing the plaintiff's complexion, said that it was now "fair, rather sun-burnt, pinkish" (Vol 7, p 407, ll 6-7)

Satyendra's attitude in the matter of complexion was no less uncompromising than his sister's. After the conclusion of the evidence of the aforesaid expert, learned counsel for the defendants is said to have made a statement in court regarding the second Kumar's complexion in these terms

"As between the second Kumar and the plaintiff it is very difficult to describe the shade of difference in their complexion. I do not say the difference in their complexion is such as could not possibly deceive people to take the one for the other" (*vide* plaintiff's petition dated 8-3-35, Vol 15, p 243 see also *ibid*, p 247, for defendants' reply)

This statement was directly put to Satyendra in cross-examination, but Satyendra's answer was emphatic "I do not accept this statement" (Vol 16, p 449, ll 34-41)

The redoubtable Dr Ashutosh Das Gupta, also always emphatic in his statements, categorically asserted "A glance is enough to show that the complexion of the plaintiff and that of the second Kumar are entirely different" (Vol 16, p 332, ll 32-33)

On the question of the colour of the hair, as the learned judge points out (Vol 18, p 69, ll 1-11), the defendants made the case at one stage that the Kumar's hair was brown, but that of the plaintiff was black, as will appear, for instance, from the evidence of Atul Prosad Roy Chowdhury already quoted (Vol 3, p 28, ll 19-20). The Punjab witnesses who were called to prove that the plaintiff was Mal Singh of Anjla also gave him black hair, e.g., Mohor Singh, who says "His hair was black but not very black" (Vol 3, p 376, l 45), Gurdit Singh, who says "His hair was dark, but a few were brown" (*ibid*, p 381, l 1), and Mahna Singh, who says "Attar Singh had black hair and Mal Singh's hair was also black" (*ibid*, p 394, l 1). Landsay had, however, found the hair "golden rather than red like Atikullah's, as he notes in the margin of his memorandum of the interview with the plaintiff (*Ex Z*(358), Vol II, p 313). Lt-Col Pulley, the A D C to the Lt-Governor, began by saying that the plaintiff's hair looked as if it was dark and gone grey like that of an ordinary Indian, but ended by agreeing that it was more like his own hair! (Vol 5, p 132, ll 14-27). Then followed the theory, put to Jyotirmoyee Devi in cross-examination, that the hair was originally black, but turned red, "almost golden", through lack of oil and from exposure to the sun! (Vol 8, p 356, ll 10-32). Other witnesses coming afterwards no doubt admitted a certain similarity.

. As regards the eyes, having regard to the defendants' case, not that it was consistent throughout, I wonder how the colour of the same could be at all put forward as a point which might cause even a suspicion of sameness.

PHYSICAL RESEMBLANCE

The learned judge has gone fully into the question of these physical characteristics as of all other bodily features, and has in fact left very little to add, and while I unreservedly accept his conclusions, it is sufficient to

state that in my opinion there is nothing in the evidence to support the view that in the matter of physical resemblance the defendants had at any stage any case other than one of "utter dissimilarity" That case, I repeat, they had themselves put as a halter round their necks, and if it should suffocate them to death, they ought to know whom to thank for it It was a lame attempt which Mr Chaudhuri made to get his clients out of a position from which there was really no escape Neither fair complexion, nor brown hair, nor blue eyes can by themselves produce a possible deception, but if there is a certain sameness in general appearance, individual features may doubtless help either to check or to confirm recognition Mr Chaudhuri's suggestion that strangers might be deceived, but not those who had known the Kumar intimately, only lends support to the plaintiff's case that the near relations who said they had recognised the plaintiff could not possibly have made a mistake

In the result I unhesitatingly hold that the plaintiff's evidence of recognition stands wholly unshaken

SITUATION AT JAIDEBPUR ON PLAINTIFF'S RETURN—STRIKING PROOF OF HONEST RECOGNITION

This evidence receives overwhelming corroboration from the course of events which happened at Jaidebpur, following the two visits of the plaintiff which I had occasion to mention earlier in my judgment,—the first being the "*Chait Sankranti* visit" of barely three days in the second week of April, 1921 when he was sent down there from Kasimpur, having been taken to Kasimpur from Buckland Bund on the 5th April to the house of the local zemindar Sarada Prosad Roy Chowdhury, and the next, a much longer visit when he came again on the 30th of that month, in the course of which took place the *Atma-Parichay* or the Declaration of Identity on the 4th May, and the great public meeting on the 15th May The story of these days has been described by the learned judge in graphic detail with reference to all the relevant evidence (*Vol 18, from p 67 onwards*), and should be read in full to appreciate the situation which arose, a situation which I agree could be explained only on the hypothesis of honest recognition by Jyotirmoyee Devi and others, and say what Mr Chaudhuri might, really shattered to pieces the whole edifice which he tried so sedulously to build of a huge conspiracy hatched and perfected by "a few designing persons"

Speaking for myself, I believe the story fully, and am not prepared to say, in spite of Mr Chaudhuri's criticisms, that the learned judge has taken a wrong view of the evidence He has in fact dealt with it so carefully and so exhaustively that I do not feel called upon to do more than express my entire concurrence with him in his conclusions

A series of facts emerge from this evidence, all of which, however, it is not necessary to call attention to as establishing full recognition of the plaintiff as the second Kumar this did not follow in fact until the plaintiff declared his identity for the first time on the 4th May, 1921, confirming by this declaration what had only been a suspicion, strong as it was, in the minds of Jyotirmoyee Devi and other relations,—a suspicion which had doubtless arisen at the very first meeting with the plaintiff at her house on the *Chait Sankranti* visit (*Vol 8, p 295, ll 18-34*), only to be further strengthened when she invited him to a meal the next day (*ibid p 296, l 9—p 298, l 15*), which afterwards led the sister to seek him out at Dacca 11 or 12 days later on his return from Langalbad, and get him for a few

minutes at Saibalini's house there (*ibid*, p 298, ll 22-42), and which, again, made her send for him on the 30th April (*ibid*, p 299, ll 2-12), getting him this time to stay with her in her house and finally reveal himself (*ibid*, p 299, l 11—p 303, l 29)

DEFENCE CRITICISM BASED ON MEMORIAL VERSION

According to Mr Chandhuri, the account of all these happenings as related by Jyotirmoyee Devi and other witnesses of the plaintiff is all so unnatural as to be unbelievable, and he lays great stress on the discrepancy between this version and the case made in the plaintiff's memorial to the Board (*Ex J*, Vol III, pp 92-120). The story as set forth in paragraphs 10-14 of the memorial, he points out, is that the plaintiff was recognised at Buckland Bund by D W Atul Prosad Roy Chowdhury, who being "convinced" of his identity took him to Kasimpur, treated him there as the second Kumar, and made a public announcement to that effect, that following this declaration, the plaintiff was taken to Jaidebpur by his relations on an estate elephant, was acclaimed there as the Kumar and accepted by the family "with all the warmth and affection for a lost dear and near relation" (*ibid*, p 94), a story which would place the recognition by the relations somewhere about the *Chait Sankranti* visit. There is no reference to the Declaration of Identity of the 4th May.

BUT FACTS ADMITTED IN NEEDHAM'S REPORT

As I have pointed out more than once, it is possible to attach too exaggerated an importance to the memorial, as if it was designed to give a full and detailed account of the plaintiff's case, without any reference to the specific object which the plaintiff's advisers had in view in thus moving the executive authorities. So far as the present matter is concerned, a discussion about the memorial version is really reduced to one of academic interest in view of certain admitted facts, and particularly of a document originating from defence sources, being the report of the Chief Manager Needham to Landsay of the 5th May, 1921 (*Ex 59*, Vol II, pp 212-213). The outstanding facts which, the memorial notwithstanding, the defendants are unable to deny are that the plaintiff was at Dacca staying on the river-side opposite to Rup Babu's house, was taken from there to Kasimpur at the instance of Sarada Prosad Roy Chowdhury, and after a few days' halt here, was then sent down to Jaidebpur, that he did stop here at Madhabbari, and during his stay at this place, was taken to the house of Jyotirmoyee Devi at Chakkar where he met her and other relations, that he was suspected by them to be the second Kumar on account of the resemblance which showed through the veneer of ashes still covering his face and body, that the plaintiff himself was visibly affected, and particularly on being shown a photograph of the second Kumar, which drew tears from his eyes, that he then left for Dacca without giving any answers to the questions put by the inmates of the house regarding his identity, that after a few days he was again brought to Jyotirmoyee Devi's house by Atul Prosad Roy Chowdhury, that an impression thereafter began gaining ground amongst tenants and outsiders who were visiting him daily in their hundreds that he was none other than the second Kumar, that he declared his *atma-parichay* on the 4th May evening in the presence of a numerous crowd after giving some details of his past, that he then fainted and the people present shouted *bulu-dham*; and *jay-dham*; and that all the persons there were convinced about his identity.

The evidence of the plaintiff's witnesses only elaborates the picture thus given in broad outline, which is all to be found in Needham's report, *Ex 59*. The dry light of this document is indeed enough to wither away to destruction the whole crop of falsehoods raised by the defence to defeat the plaintiff's story.

VERSION OF DEFENCE WITNESSES

The defendants' version is given mainly by D W 310, Jogendra Nath Banerjee (*Vol 15, pp 435-539*), D W 117, Mohini Mohan Chakravarty (*Vol 14, pp 379-416*), D W 92, Phani Bhusan Banerjee (*Vol 14, pp 104-288*), D W 365, Dr Ashutosh Das Gupta (*Vol 16, pp 240-346*), and D W Atul Prosad Roy Chowdhury (on commission) (*Vol 3, pp 22-69* see judgment, *Vol 18 p 68, ll 32-40*, and D W 434, *Vol 17, pp 382-383*, as to how this witness avoided coming to depose in court).

Some of the points sought to be made through these witnesses were as follows —

(i) That every body knew that the second Kumar had been dead and burnt to ashes years ago, and that there had never been a rumour that he was living or going about with sannyasis (*Vol 14, p 405, ll 7-10, and Vol 15, p 445, ll 6-9*).

(ii) That the man who was claiming to be the second Kumar looked utterly dissimilar, with brownish eyes, whereas the second Kumar's eyes were blue (*Vol 15, p 451, l 28—p 452, l 23 and p 490, ll 32-36*).

(iii) That at a Tea Party given by Jogendra Nath Banerjee at the Gol-verandah of the Raj Bari on the Bengali New Year's Day, 1st Baisakh, 1328 (14th April, 1921), the plaintiff who was present at the function openly gave out that he was a Naga and had his ashram in the Punjab (*Vol 14, p 380, ll 16-24, and Vol 15, p 447, l 34—p 448, l 10*), according to Atul Prosad Roy Chowdhury, the plaintiff had given out his name as Sunder Das even earlier at Kasimpur (*Vol 3, p 23, ll 3-4*).

(iv) That the plaintiff was being taken from place to place merely as a medicine-man, to cure sterility or other female disease, or eye-trouble, though everywhere he was proving his incapacity in this respect, the earliest story being that he was brought over to Kasimpur to perform a *putreshtha-jayna* for Sarada Prosad Roy Chowdhury (*Vol 14, p 379, ll 38-39 and p 380, ll 7-11, Vol 15, p 445, ll 24-25 and p 448, ll 12-16, and Vol 3, p 22, ll 29-35*).

(v) That Phani Bhusan Banerjee saw the plaintiff sitting out in Jyotirmoyee's yard like an ordinary sannyasi distributing medicines, and showing himself utterly incapable of talking or even understanding Bengali (*Vol 14, p 134, ll 11-13*).

Curiously enough, none of the defendants' witnesses would admit any first-hand knowledge of the Declaration of Identity. Phani Bhusan Banerjee, it appears, conveniently removed himself to Dacca, returning to Jaidebpur only in the evening (*Vol 14, p 134, ll 16-18*), while Jogendra Nath Banerjee, without attempting any explanation, was content merely with saying "It is false that Mohini Babu and I were present at *atma-panchay*" (*Vol 15, p 449, ll 6-7*). Mohini Mohan Chakravarty could not help making a slight concession "If so many people had come, we would have gone to find out why so many people were going there" (*Vol 14, p 397, ll 22-23*), but then

he felt no scruple in making the definite suggestion that the "several hundreds of tenants" in Needham's report (*Vol II, p 212, ll 33-34*) was an "exaggeration" (*Vol 14, p 397, ll 18-19*), though according to his own evidence he was the draftsman of that report in collaboration with Jogendra Nath Banerjee (*ibid, p 381, ll 28-30 and p 400, ll 8-10*), and both must have believed the account given in it to be true

Jogendra Nath Banerjee was in fact asked if at the time Needham signed the report, witness believed every statement in it to be false, and the answer was "No, I believed then that the account it contained was true" (*Vol 15, p 457, ll 1-3*), and later, he categorically stated that he believed it to be a fact, as set out in the report, that "all the people who were present at the time were convinced that he was no other than the second Kumar", adding that by "all the people" he included the inmates of the house (*ibid, p 491, ll 15-21*)

SHAMELESS EQUIVOCATION

Mohini Mohan Chakravarty tried to prove himself a little cleverer. He was taken through the report, bit by bit, in examination-in-chief, and indicated the portions which were within his knowledge, or were mere hearsay, or were only his inferences (*Vol 14, p 381, l 30—p 382, l 26*). The information about the Declaration of Identity was said to have been supplied by Budhu and Jabboo or either of them, as witness and Jogendra Nath Banerjee were on their way to Jyotirmoyee Devi's house along with these boys after the *atma-parichay*, Budhu being a son of Jyotirmoyee Devi and Jabboo a son of her sister Indumoyee Devi. It was impossible to get out of this witness a straight answer whether he believed what he had heard,—the clearest indication, to my mind, of the dishonest evidence he was giving. His first statement was "The things that Budhu Babu and Jabboo said during the journey to the house of Budhu, there was no reason to disbelieve at that stage", and then in the same breath he said "We did not believe, of course, that a man who had been cremated could come back", adding, however, "but we believed Budhu as to what had happened" (*ibid, p 395, ll 19-22*). Then followed a piece of shameless equivocation, in a desperate struggle to avoid an admission that the family could have been under the honest impression that the plaintiff was the second Kumar "We had no reason then to doubt what Budhu and Jabboo had said", but then, "they might have done that from suspicion alone" "Honestly?"—"Can't say. We thought they might have believed that from suspicion" "Suspicion of what?"—"That he was the real man. *They believed in the suspicion that he was the real man*" (*ibid, p 395, ll 28-41*). He gradually worked himself up to the view that from the conduct of Jyotirmoyee Devi and her family, although they had not said so, he gathered they had not accepted the plaintiff (*ibid, p 396, l 32—p 397, l 3*). Later, in a moment of forgetfulness he let it slip out of his mouth that Needham accepted the facts reported to him upon the statements of himself and Jogen Babu (*ibid, p 401 ll 12-13*), and when thereupon followed the natural question, if he believed the facts as he gave them to Needham, he replied, perfectly unabashed "I said without looking at the letter that Mr Needham believed and accepted the facts on the faith of our statements" (*ibid, p 401, ll 16-19*), and then, with supreme disregard for consistency, went on to explain to the court "We told him that as to the facts which we were giving him on report, we did not know whether they were true or false, but they seemed to us to be

impossible. This is what we told Mr Needham" (*ibid*, p 401, ll 25-27) This means that though he "did not believe what was not within his knowledge, but thought it impossible", he "still put these down as facts in the letter to the Collector", the explanation for this being ready to hand. "There was no time for enquiry"! (*ibid*, p 404, ll 4-8) Finally, he ended by saying that "Jogendra Babu said to Mr Needham on the 5th when the letter to Collector was being sent that it was a mere *jakkhars* (fiction)—the second Kumar had been dead and burnt years ago" (*ibid*, p 405, ll 7-9) It is useless to quote further from the evidence of the witness to show the consummate master he was in the art of prevarication

NEEDHAM'S REPORT, THE STRONGEST REFUTATION "REPORT OF A BELIEVER"

Needham's report, whoever might have been the draftsman and whatever the source of the information on which it was based, seems to my mind to be the strongest refutation of the whole of the defendants' case as sought to be developed through the evidence of these lying witnesses. Clearly and definitely, as it seems to me, it was not only a report of the doings of people who honestly believed the sadhu to be the second Kumar, but as the learned judge says, it was "the report of a believer" (*Vol 18, p 93, l 15*). There was not a word in it to suggest that those who recognised the sadhu were the victims of a colossal hoax, seeing that the second Kumar had been dead and cremated long ago nor in fact a reference either to the tea party at which the sadhu is alleged to have declared himself a Punjabee and a Naga, or to his having been a mere medicine-man, taken about from place to place in that capacity, though only for ineffective cures of female diseases neither was there the slightest hint about the supposed "utter dissimilarity" in appearance which at once told him off from the second Kumar. On the other hand, there was a suggestion for "a sifting enquiry about the sadhu", by which, as Mohun Mohan Chakravarty explained (*Vol 14, p 403, ll 32-34*), was meant an enquiry into the identity of the plaintiff, showing, if anything, the existence of an honest doubt on the point in the minds of those who were responsible for the report.

FUTILE ATTEMPT TO BELITTLE THE REPORT

To me it seems to be futile to try and destroy the effect of this document by showing that it merely gave the facts as supplied by two interested persons who, by the way, both happened to be dead. The report was going to be sent by the Chief Manager to the Collector of the district, to all intents and purposes an official communication, though in the form of a letter it purported to deal with a grave situation which threatened to imperil the administration of the estate, and it is absurd to suppose that either Jogendra Nath Banerjee or Mohun Mohan Chakravarty, both holding responsible positions under the Manager, the one as Superintendent and the other as Assistant Manager, even if none of them was actually present at the *atma-parichay*, should put into it matters about the authenticity of which they themselves entertained a doubt.

There is doubtless the statement in the report that "finding the gravity of the situation, the inmates of the houses of late Sri Indumoyee Devi and Jyotirmoyee Devi informed Mohun Babu and Mr Banerjee that the sadhu

had given out such and such things" (*Vol 11, p 212, l 40—p 213, l 3*), but it does not mean that they made no enquiries on their part as to the truth or otherwise of the story they had heard. The report in fact goes on to state that "they forthwith proceeded to the house of Sri Jyotirmoyee Devi and enquired about the matter" (*ibid, p 213, ll 3-4*). Even if, as the report states, they were unable to meet the sadhu that evening, or the following morning when they called again, that is no reason why they should still unhesitatingly accept the version given to them by Budhu and Jabboo, if they did not believe in it themselves at any rate, that does not explain why they should not state the facts which were supposed to be within their personal knowledge as going to discredit the whole of the story about the sadhu being the second Kumar. If their present evidence is true, neither of them need in fact have made any further enquiries to convince themselves or convince others that the sadhu was an impostor, for, apart from the fact that, as they say, they had no doubt whatever about the death and cremation of the second Kumar 12 years ago, they must already have heard from the man's own lips at the tea party that he was a Naga, who had his *ashram* in the Punjab, and must also have known him to be a sadhu who was being questioned by people, among others by Mohini Mohan Chakravarty himself, only as a medicine-man, and who had not the remotest physical resemblance to the second Kumar.

CONDUCT OF JOGENDRA BANERJEE AND MOHINI CHAKRAVARTY

And yet, as already stated, there is not a whisper about these matters in the report, though Mohini Mohan Chakravarty now says that he and Jogendra Nath Banerjee told Needham on the 4th night that the plaintiff could not possibly be the second Kumar (*Vol 14, p 396, ll 11-12*). Neither is there any indication in it of any remonstrance or expostulation which would have been only natural on their part with the ladies of the house for their attempted introduction of a Punjabee Naga into the intimacies of their family life. It is admitted that Jogendra Nath Banerjee, if not Mohini Mohan Chakravarty, was on speaking terms with Jyotirmoyee Devi, being in fact the elder brother of her son-in-law Sagar *alias* Sati Nath Banerjee, P W 977, and one should have expected him at least to go up to her direct to protest against her outrageous conduct, for so it must have appeared to him, but the evidence is, he did nothing of the kind (*ibid, p 394, ll 10-11*). Be it remembered that Sagar's wife, Promodbala *alias* Mani, was staying at the time with her mother Jyotirmoyee Devi.

Mohini Mohan Chakravarty made a feeble attempt in one part of his evidence to suggest that there was some sort of a protest from Jogendra Nath Banerjee when they went to Jyotirmoyee Devi's house on the 4th evening.

"Q—Did Jogen Babu say then that it was all nonsense—that the Kumar had long been cremated?

A—He said that " (*ibid, p 394, ll 15-17*)

Earlier, however, he had stated

"He (Jogendra) did not say to Budhu and Jabboo 'Are you fellows gone mad? He was reduced to ashes at Darjeeling'" (*ibid, p 393, ll 18-19*)

On the next morning, again, according to this witness, he and his companion were both very anxious to convince the inmates of the house that the plaintiff was not the second Kumar "we did say that morning about the second Kumar's death, cremation and *sradh* and asked—how could he return?" (*ibid*, p 398, ll 28-32) Unfortunately, however, for the witness, Jogendra Nath Banerjee does not support him in these well-meant efforts to carry conviction to the deluded relations, and he could not help involving himself in rather an obvious inconsistency, for it was also his evidence that on the 4th evening he "did not collect that Jyotirmoyee Devi and her family had accepted the *sadhu*" (*ibid*, p 396, ll 32-33), and even up to the 5th morning they did not understand "the family were very much convinced", so, as he added, "no very great efforts were made to unconvince them" (*ibid*, p 398, ll 33-35)

As I have said before, it is impossible to place any reliance on the evidence of any of these witnesses, and I should certainly prefer to accept the statement of Jyotirmoyee Devi that Jogendra Nath Banerjee, if not Mohun Mohan Chakravarty, was present at the Declaration of Identity, and had in fact been coming to her house very often both before and after (*Vol 8*, p 303, ll 2-3, p 361, ll 1-2 and p 362, ll 7-10), as is also testified by Jogendra Nath Banerjee's brother Sagar (*Vol 11*, p 191, ll 21-23) Both these estate officers, I am satisfied, must have been convinced about the honesty of Jyotirmoyee Devi and the other relations in accepting the plaintiff as the Kumar, and if not equally convinced themselves, must have, at any rate, been troubled with an honest doubt about the identity. It is thus in fact which took them to Jyotirmoyee Devi's house on the 4th May and on other days—to "test" their recognition of the *sadhu*, as Mohun Mohan Chakravarty himself admitted at one stage (*Vol 14*, p 393, ll 8-10), though it is not surprising that the witness tried to go back upon the statement a little later (*ibid*, p 396, ll 6-11) Jogendra Nath Banerjee on his part repudiated the idea of "testing" altogether, suggesting that he went with no definite object, but "just to see what was happening out of curiosity" (*Vol 15*, p 471, l 31—p 472, l 7) This witness, I should have pointed out before, first denied that he had been specially appointed to look after the case on behalf of the defendants (*ibid*, p 474, l 36—p 475, l 2), and persisted in this denial as long as he could (*ibid*, p 484, ll 5-6), but had finally to admit that it was a fact that the Government Pleader had asked for "a special *tadbhikar*", and he had been selected with the duties he indicated (*ibid*, p 485, ll 1-2)

ATMA-PARICHAY NOT A STAGED DEMONSTRATION

Mr Chandhuri could not deny the fact of *Atma-parichay* altogether, but sought to belittle the incident as much as he could, though it is significant he dared not call a single witness to give his version of the affair, as he might undoubtedly have done, if he wanted to, seeing that hundreds of persons must have been present on the occasion. As it is, the evidence of the Declaration of Identity on the plaintiff's side remains wholly uncontradicted (*Vol 18*, p 93, ll 39-44) It is no use calling attention to small discrepancies in the account given by the plaintiff's witnesses, either as to the exact date or time when the declaration was made, or as to the exact spot where he was then seated, or as to the exact questions or sequence of questions which were asked, or as to the persons who asked them. These discrepancies such as they are, are only strong confirmation of the fact that the witnesses had not

been put up to speak to a tutored story, and I cannot help observing that if Mr Chaudhuri should hope to succeed in his case on the strength of such small points of detail, he must be hoping in vain. After all, as it seems to me, the case will have to be decided on its broad facts, and upon a reasonable view of the evidence as a whole, without unduly fastening upon non-essential details which do not affect its veracity at all. Treating the evidence of the *atma-parichay* in this way, I have no hesitation in holding that the learned judge has come to an absolutely correct finding regarding the matter. "the defendants can no more wipe it out than they can wipe out the sun" (*ibid*, p 91, ll 33-35)

There is in my opinion no warrant whatever for Mr Chaudhuri's suggestion that the *Atma-parichay* was only a demonstration staged on purpose by Jyotirmoyee Devi and the other members of the family after they had finally made up their mind to pass off the plaintiff as the second Kumar, knowing him to be an impostor as they did. The object, it was said, was two-fold,—on the one hand, to overcome the reluctance and diffidence of the plaintiff himself to play the part which they wanted him to play, by assuring him of public support, and secondly, to canvass such support in order that their plans might be carried to a successful issue. It is a pity, however, that none of this case was put to Jyotirmoyee Devi or any of the other witnesses who spoke about this affair. Such a suggestion would in fact contradict and be contradicted by the case made by Mr Chaudhuri himself on other points—his theory of "utter dissimilarity", for instance, as well as his view that the *Atma-parichay* was really a hole and corner affair, apart from the fact that it would postulate a sudden conspiracy on the part of the inmates of the house on the off-chance of being able to carry it through.

TRUE SIGNIFICANCE OF THE EVENT

By declaring himself as the second Kumar whether of his own accord or at the instigation of others, the plaintiff of course does not establish himself as such, nor will the acclamations of a crowd at a public gathering prove the fact of identity. The *Atma-parichay* and the other incidents which happened both before and after, are important from the plaintiff's point of view only as showing the course of events which led up to and followed the recognition and acceptance of the plaintiff by the family. They would doubtless affect the question of *bona-fides* of their recognition, but such *bona-fides* are not attacked by making suggestions for which there is no foundation laid in the evidence. Beginning from the day of the first meeting with the plaintiff at her house during the Chait Sankranti visit, I do not see anything in the conduct of Jyotirmoyee Devi, or, I may add, of any of the other relations, which may be said to have been unnatural or improbable. On the other hand, it was the conduct of people who were suddenly startled into recognition of a long-lost near and dear one, but could hardly yet believe their eyes, the flicker of a hope kindled by rumours from time to time that he might be still living having died down almost to extinction, and who were anxious, therefore, to avoid taking any action in haste which they might have to repent at leisure. It was not the artful manœuvring, though without the art to conceal it, of a motiveless conspiracy to propound an impostor, but only a resolute struggle to guard against the possibility of being even unwittingly led to accept an impostor. As Jyotirmoyee Devi put it: "Considering our family we wanted to be dead certain so that no question could ever arise in our minds" (*Vol 8, p 300, ll 40-42*), a very correct representation indeed of the attitude of the whole family towards the plaintiff. There is, I repeat, nothing in the evidence

of their conduct during this period to show that the plaintiff was being slowly won over to play the part of the second Kumar, or that the public mind was being prepared for his acceptance as such

Mr Chaudhuri makes much of the fact that the plaintiff in his own evidence made a confusion regarding the date on which he made the declaration of his identity. In his examination-in-chief he indicated the date as the 1st May, the day following his arrival at Jaidebpur, an examination of the marks on his body being stated to have been made the same morning (Vol 4, p 106, ll 24-35), while in cross-examination he said that the marks were seen "1 or 2 days before the Bhowal meeting" (*ibid*, p 164, ll 11-13), two statements, which are doubtless not only inconsistent with each other, but incorrect too, even if the "Bhowal meeting" be taken to refer, not to the big public meeting of the 15th May, but to that at which the declaration of identity was made. This is, however, nothing but honest failure of recollection, which not only does not shake the credit of the plaintiff, but cannot affect the evidence of Jyotirmoyee Devi regarding these happenings,—evidence, which, as already pointed out, receives full corroboration from the only contemporaneous record of the time, the report of Needham leaving no doubt whatever as to the factum or the date of the *Atma-parichay*, or as to the date of the plaintiff's arrival at Jaidebpur

EXAMINATION OF PLAINTIFF'S MARKS

Mr Chaudhuri, again, poured ridicule on Jyotirmoyee Devi's story of the examination of the plaintiff's marks, and their subsequent announcement to the assembled visitors, before the Declaration of Identity (Vol 8, p 300, ll 28-42, p 301, ll 22-28 and p 352, ll 16-19), supported as it was by the evidence of the plaintiff himself (Vol 4, p 106 ll 26-30, and p 164, ll 11-14) and other witnesses, such as Billoo (Jitendra Chandra Mukherjee), P W 938 (Vol 10, p 336, ll 11-31, p 337, ll 1-12, p 355, ll 37-38, p 356, ll 36-37 and p 357, ll 1-8), and Sagar (Sati Nath Banerjee), P W 977 (Vol 11, p 190, ll 1-11 and ll 24-25, and p 202, l 39—p 203, l 11). The whole proceeding, he said, was utterly unnatural,—Jyotirmoyee Devi, according to his caricature of the scene, acting as "the tally-clerk of marks", recounting them one after another, and the nephew checking them off, and the suggestion was that they falsely imputed to the second Kumar the marks which they thus found on the plaintiff (Vol 4, p 164, ll 24-25, Vol 8, p 371, ll 21-23, and Vol 10, p 357, ll 7-8). If there was genuine recognition on the part of the sister and the family, it was added, such an examination of marks would never have taken place

NEITHER "IMPROBABLE" NOR "UNNATURAL,"

It is difficult to follow what Mr Chaudhuri meant—whether he denied the fact that the marks had been seen, or denied that the plaintiff had on him the marks of the second Kumar. The first of these suggestions is negatived by the case which, as the learned judge points out (Vol 18, p 91, ll 29-33), he had himself put to Jyotirmoyee Devi (Vol 8, p 371, ll 21-23) as also to the plaintiff

"Q—Isn't it a fact that the marks on your person were seen, and it was given out that those were in the second Kumar?" (Vol 4, p 164, ll 24-25)

As regards the other, the best answer is supplied by the fact that the plaintiff does show on his person certain distinctive marks which were un-

deniably on the second Kumar, namely, an "irregular scar" over the left outer ankle which is spoken to by the defendants' own medical witnesses Lt-Col Denham White and Major Thomas (*Vol 17, p 154, l 36—p 155, l 2, and p 170, ll 1-5*), and is specifically mentioned as a distinguishing mark of the second Kumar in his insurance proposal (*Ex 230, Vol I, p 175, ll 2-3*), and also a rough and striated skin on the insteps and ankle joints, which appears to have been almost a characteristic feature running through the second Kumar's family, having been present on the feet not only of the second Kumar, but also of Raja Rajendra Narayan Roy, Kripamoyee Devi, the Chota Kumar and Budhn, and being still noticeable in Jyotirmoyee Devi and her daughter Mani. If the existence of these marks is established, there seems to be no reason why the evidence regarding the others should be summarily rejected.

I refuse to believe that all this was an elaborate concoction which Jyotirmoyee Devi solemnly put forward in court, only to give counsel on the other side a chance to denounce the story as on the face of it so utterly "improbable" and "unnatural" as to carry its own condemnation. No one minded to make a false case would unnecessarily lay himself or herself out to such an obvious attack. It is worthy of note that there was not a word of cross-examination from Mr Chaudhuri on this evidence, except only to suggest that the witness was ascribing to the second Kumar the marks she had found on the plaintiff, a suggestion which she had already answered in anticipation in her examination-in-chief (*Vol 8, p 301, ll 29-31*).

With all respect to Mr Chaudhuri, I for one see nothing in Jyotirmoyee Devi's conduct to merit the description learned counsel chooses to apply to it. As she explains, the object of looking for the marks was only to make assurance doubly sure, and far from weakening the evidence of recognition or casting doubt on its genuineness, seems to my mind only to place it on a stronger and more certain basis.

SITUATION RECALLED

What after all was the situation, if one must judge the probabilities? The plaintiff arrived at Jyotirmoyee Devi's house on the evening of the 30th April, the ash-besmeared sadhn she had been before and whom she had already begun to suspect as her second brother, brought there at her instance by her son and by Atul Prosad Roy Chowdhury, (though the latter falsely denied having had anything to do with it), because she was anxious to resolve the suspicion. She had no talk with him that night, but saw him weeping, which she was told he did on seeing some photos of the Kumars. Next morning he went to the river Chillai for a bath, and returned, ashes all over as before. She was, however, burning with a desire to have a clearer view of the complexion, stripped of this veneer, and accordingly pressed him not to put on the ashes next day. But he would not comply, and her remonstrance was in vain. So the following day she sent a man along with him to the river, and for the first time he came back with the body bared of all disguise. "Then", as she says, "I saw his complexion. It was the second Kumar's complexion as of old, and seemed brighter still on account of *Brahmacharyya*. Then, looking at his face, clean from ashes, he looked like Ramendra himself. I noticed his eye-lids darker than his complexion. I saw the mark left by the carriage wheel on his leg, and I saw the rough and scored skin at the wrists and on the insteps."

There is a ring of sincerity in these words which there is no mistaking. The recognition was complete, not only on her part, but also on the part of other relations and of the neighbours who were present. And yet to remove all uncertainty, she wanted to see the marks on this day, and asked her son to look for them, but the sadhu would not allow it—he had in fact, been all the time protesting that he was “nobody” to them. It was only the next morning that he yielded, and then later in the day, unable to resist himself any longer, finally revealed his identity,—a complete capitulation to the subtle but gathering forces of *Maya* within, which he had striven so hard and so long to withstand (Vol 8, pp 299-300)

ATTITUDE OF THE FAMILY

It is futile for Mr Chandhuri to refer to a statement in Needham's report occurring towards the end, as showing an attitude of hostility on the part of the relations even after the declaration of identity. “The inmates of the house”, it is stated there, “threatened the sadhu that he was incurring great responsibility by expressing in words and by conduct that he is the second Kumar and that he cannot leave the place without giving the full particulars about his identity and past history” (Vol II, p 231, ll 6-10). This supposed threat to the sadhu after the *atma-parichay* was put to Jyotirmoyee Devi in cross-examination, but she said she had not heard anything about it, and did not know all that she could say was that there was no question of the plaintiff having wanted to leave after the declaration of identity (Vol 8, p 382, l 28—p 363, l 8), a fact also spoken to by Sagar (Vol 11, p 202, ll 22-23). On Mohini Mohan Chakravarty's own showing he had incorporated the statement in the report on hearsay “this is what we were told”, said he, mentioning Bndhu and Jabboo, both dead, as the sources of his information (Vol 14, p 381, ll 23-26, p 382, ll 23-24 and p 399, ll 15-16). Phani Bhusan Banerjee repeated the tale, as also on hearsay, though he would not admit that it was in the Needham report (Vol 14, p 134, ll 23-28 and p 215, ll 38-41). It is difficult to see in these circumstances how the story could be regarded as proved, but supposing it to have been a fact, it could certainly not be said to indicate that the family had refused to accept the plaintiff—it showed, if anything, only an anxiety on their part to get further particulars from the plaintiff himself in order to confirm the impression he had already created in their mind as to his identity. Mohini Mohan Chakravarty himself admitted that he “did not collect that they were thinking that the plaintiff was an impostor”, though he added “they were doubting whether he was the real man or an impostor” (Vol 14, p 399, ll 17-19). In no sense thus can the Needham report lend any support to Mr Chandhuri's view regarding the attitude of the family towards the plaintiff in spite of the *atma-parichay*.

One should not indeed be far wrong in supposing that this particular statement was put in on purpose that the authors of the report might not, if they could help it, have to commit themselves all at once to a definite attitude of hostility to the sadhu (Vol 18, p 97, ll 22-26). As Billoo put it “Jogen Babu was actually present at the *atma-parichay*, so that all that I can say is that not knowing what attitude the Court of Wards was going to take, Jogen Babu did not want to commit himself in writing—it is possible that that is why he was taking up a non-committal attitude” (Vol 10, p 358, ll 6-9) according to witness, this passage as well as the other one as to the inmates of the house having informed Mohini Babu and Mr Banerjee

